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However, by votes of twelve to forty and eighteen to thirty-six, delegates rejected the proposals for treating the attorney general differently from other heads of principal departments.[69] The argument against electing the attorney general, founded primarily on the belief in a strong chief executive, was summed up by George McLaughlin, himself a lawyer:

> If we yield in one respect, we might as well elect our commissioner of welfare, our commissioner of education, and having provided those, I feel that we should go right down the list and completely dissipate the theory upon which the voting has taken place . . . I am violently opposed to the election of the attorney general . . . I don't think the election of him accomplishes any purpose. The blunt fact is that there is a general misconception as to the function of the attorney general. The attorney general is a lawyer and his opinion is the equivalent of any other lawyer's . . . Any recommendation he makes, if acted upon, can always be attacked in the courts by private citizens. His opinion is . . . impressive upon the state and the officials are bound by it until some irate taxpayer attacks it and the actions taken under the authority of it and the courts can promptly overrule it . . . His functions are not quasi-judicial. He is another attorney giving an opinion . . . I think if we are going to have an attorney general, the power should be vested in the governor to appoint him without any screening by a judicial council or anything of the sort . . . (The) attorney general does, in a sense, bear the same relationship to the governor as any attorney bears to his private client . . . It is an attorney-client relationship and the relationship has to be based on personal selection.[70]

Executive Departments

The Committee on the Executive proposed that all executive and administrative functions be allocated among a maximum of twenty departments, all under supervision of the governor. There was little disagreement with this recommendation. The problems arose on the question of how each department was to be headed: by a single department head or by a governing board or commission that could in turn designate a departmental executive.

The committee's guiding principle was that single department heads would, in chairman Victor Rivers' words, " . . . help effectuate and make more efficient the strong executive type of government in the executive branch."[71] Delegates saw the state constitution as a means of eliminating and avoiding the proliferation of boards and commissions that had characterized territorial government. While they deemed it necessary then to provide Alaskans at least some

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[69] *Ibid.*, pp. 2193-2200, 2215, 2226.
[70] *Ibid.*, p. 2196.
[71] *Ibid.*, p. 2034.

bill, with a statement of his objections, of origin.

16. Upon receipt of a veto message gular session of the legislature, the hall meet immediately in joint session ler passage of the vetoed bill or item. se revenue and appropriation bills or ugh vetoed, become law by affirmative ee-fourths of the membership of the Other vetoed bills become law by vote of two-thirds of the membership ature. Bills vetoed after adjournment of ular session of the legislature shall be l by the legislature sitting as one body n the fifth day of the next regular or ion of that legislature. Bills vetoed nment of the second regular session considered by the legislature sitting no later than the fifth day of a special at legislature, if one is called. The vote eration of a vetoed bill shall be entered als of both houses.

ent of this section was approved by the voters of ber 2, 1976 and became effective December 23, ndment inserted "during a regular session of the e first sentence and added the present fourth and

17. A bill becomes law if, while the in session, the governor neither signs within fifteen days, Sundays except- delivery to him. If the legislature is not d the governor neither signs nor vetoes twenty days, Sundays excepted, after him, the bill becomes law.

18. Laws passed by the legislature be- ve ninety days after enactment. The ay, by concurrence of two-thirds of hip of each house, provide for another

Local or Special Acts

SECTION 19. The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination. Local acts necessitating appropriations by a political subdivision may not become effective unless approved by a majority of the qualified voters voting thereon in the subdivision affected.

Impeachment

SECTION 20. All civil officers of the State are subject to impeachment by the legislature. Impeachment shall originate in the senate and must be approved by a two-thirds vote of its members. The motion for impeachment shall list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but shall not prevent proceedings in the courts on the same or related charges.

Suits Against the State

SECTION 21. The legislature shall establish procedures for suits against the State.

ARTICLE III

THE EXECUTIVE

Executive Power

SECTION 1. The executive power of the State is vested in the governor.

Governor: Qualifications

SECTION 2. The governor shall be at least thirty years of age and a qualified voter of the State. He shall have been a resident of Alaska at least seven years immediately preceding his filing for office, and he shall have been a citizen of the United States for at least seven years.

in joint session, these orders become effective at a date thereafter to be designated by the governor.

Supervision

SECTION 24. Each principal department shall be under the supervision of the governor.

Department Heads

SECTION 25. The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the Secretary of State. The heads of all principal departments shall be citizens of the United States.

(The Sixth Legislature's Senate Joint Resolution No. 2 "changing the name of the secretary of state to lieutenant governor" in sixteen sections of the Alaska Constitution, approved by the voters August 25, 1970, inadvertently omitted express amendment of this section.)

Boards and Commissions

SECTION 26. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

Recess Appointments

SECTION 27. The governor may make appointments to fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature. The duration of such appointments shall be prescribed by law.

ARTICLE IV

THE JUDICIARY

Judicial Power and Jurisdiction

SECTION 1. The judicial power of the State is vested in a supreme court, a superior court and the courts established by the legislature. The jurisdic-

tion of courts shall
courts shall constitute
operation and admin
shall be established by

Supreme Court

SECTION 2. (a) Th
highest court of the S
risdiction. It shall con
whom is chief justice.
be increased by law u
preme court.

(b) The chief justi
mong the justices of t
ity vote of the justi
chief justice is three
more than one term as
serve consecutive terms

(The amendment to this s
the state August 25, 1970 and
Subsection (b) was added.)

Superior Court

SECTION 3. The su
court of general juris
five judges. The numb
by law.

Qualifications of Justices and Judges

SECTION 4. Suprem
court judges shall be c
and of the State, lice
State, and possessing a
prescribed by law. Jud
selected in a manner, f
tions prescribed by law

Nomination and Appointment

SECTION 5. The go
in an office of supren
court judge by appoint
sons nominated by the

Approval or Rejection

SECTION 6. Each
superior court judge sh
by law, be subject to
nonpartisan ballot at t

Table 18
STATE ADMINISTRATIVE OFFICIALS: METHODS OF SELECTION

State	Governor	Lt. governor	Secretary of state	Attorney general	Treasurer	Adjutant general	Administration	Agriculture	Banking	Budget	Civil rights	Commerce	Community affairs	Comptroller	Consumer affairs	Corrections	Data processing
Alabama	CE	CE	CE	CE	CE	G	...	CE	G	CS	...	G	G	AG	...	G	CS
Alaska	CE	CE	(a-1)	GB	GB	GB	A	A	A	A	G	GB	GB	GB	AT	GB	A
Arizona	CE	...	CE	CE	CE	G	GS	B	GS	G	A	(b)	(c)	(a-19)	(a-3)	GS	AG
Arkansas	CE	CE	CE	CE	CE	G	G	...	AG	AG	...	(e)	G	(a-6)	AT	GS	GS
California	CE	CE	CE	CE	CE	GS	...	GS	GS	(a-19)	G	GS	GS	CE	GS	GS	G
Colorado	CE	CE	CE	CE	CE	G	GS	GS	A	GS	A	A	A	A	AT	GS	A
Connecticut	CE	CE	CE	CE	CE	G	GE	GE	GE	A	B	GE	A	CE	GE	GE	A
Delaware	CE	CE	GS	CE	CE	GS	GS	GS	GS	GS	...	...	AG	L	AG	GS	...
Florida	CE	CE	CE	CE	CE	GS	GS	CE	(a-12)	A	A	(a-1)	GS	CE	A	GS	(a-9)
Georgia	CE	CE	CE	CE	A	G	GS	CE	GS	G	...	B	G	CE	G	GD	A
Hawaii	CE	CE	(a-1)	GS	(a-9)	GS	...	GS	AG	GS	...	GS	(a-30)	GS	G	A	A
Idaho	CE	CE	CE	CE	CE	G	GS	GS	GS	G	BGS	G	(a-10)	(h)	(a-3)	BGS	(a-6)
Illinois	CE	CE	CE	CE	CE	G	GS	GS	GS	G	GS	GS	(a-10)	CE	(a-3)	GS	(a-6)
Indiana	CE	CE	CE	SE	CE	G	G	(a-1)	G	G	G	(a-1)	A	(h)	AT	G	A
Iowa	CE	CE	CE	CE	CE	GS	A	SE	GS	(a-12)	GS	GS	A	GS	AT	GS	CS
Kansas	CE	CE	CE	CE	SE	GS	GS	B	GS	CS	B	GS	A	A	AT	GS	A
Kentucky	CE	CE	CE	CE	CE	G	G	CE	G	(a-19)	B	G	G	G	(a-3)	AG	(a-6)
Louisiana	CE	CE	CE	CE	CE	GS	G	CE	GS	GS	(a-3)	GS	GS	(a-6)	GS	GS	A
Maine	CE	...	CL	CL	CL	G	...	GLS	GLS	AG	B	GS	...	AG	GLS	AG	CS
Maryland	CE	CE	GS	CE	CL	GS	GS	GS	AGS	GS	GS	A	AG	CE	AT	AGS	A
Massachusetts	CE	CE	CE	CE	CE	G	G	G	G	AG	AT	G	G	G	G	G	A
Michigan	CE	CE	CE	CE	GS	GS	GS	B	GS	(a-6)	B	GS	A	(a-4)	A	B	A
Minnesota	CE	CE	CE	CE	CE	G	GS	GS	BS	(a-19)	GS	GS	A	(a-19)	GS	GS	A
Mississippi	CE	CE	CE	CE	CE	GS	...	SE	GS	B	...	B	(a-30)	(a-31)	AT	B	B
Missouri	CE	CE	CE	CE	CE	GS	GS	GS	AS	A	B	A	A	(a-6)	GS	GS	A
Montana	CE	CE	CE	CE	A	G	GS	GS	A	G	C	G	A	(a-6)	G	A	A
Nebraska	CE	CE	CE	CE	CE	G	GS	GS	GS	A	J	GS	A	(a-6)	...	GS	A
Nevada	CE	CE	CE	CE	CE	G	G	BG	A	(a-6)	G	G	G	CE	A	G	A
New Hampshire	CE	...	CL	GC	CL	GC	GC	GC	GC	(a-12)	B	GOC	GOC	GOC	AT	GOC	B
New Jersey	CE	...	GS	GS	GS	GS	...	BG	GS	(a-12)	A	GS	GS	GS	GS	GS	A
New Mexico	CE	CE	CE	CE	CE	GS	(a-21)	BG	GS	G	G	GS	...	(a-4)	AT	A	A
New York	CE	CE	GS	CE	...	G	...	GS	G	G	G	GS	(a-2)	CE	GS	GS	(a-21)
North Carolina	CE	CE	CE	CE	CE	G	G	CE	GS	AG	A	G	A	...	AT	G	AG
North Dakota	CE	CE	CE	CE	CE	G	A	CE	GS	(q)	(a-26)	G	A	(r)	AT	GS	A
Ohio	CE	CE	CE	CE	CE	G	GS	GS	A	GS	GS	(l)	A	(a-4)	B	GS	A
Oklahoma	CE	CE	GS	CE	CE	GS	...	GS	GS	G	B	G	G	AG	B	B	A
Oregon	CE	...	CE	SE	CE	G	GS	GS	AG	A	CS	GS	A	A	A	AG	A
Pennsylvania	CE	CE	GS	CE	CE	GS	G	GS	GS	G	GS	GS	GS	AG	A	AG	AG
Rhode Island	CE	CE	CE	CE	CE	G	GS	A	G	CS	B	GS	GS	A	BS	GS	A
South Carolina	CE	CE	CE	CE	CE	CE	(a-9)	SE	(a-4)	B	B	G	A	CE	B	B	G
South Dakota	CE	CE	CE	CE	CE	GS	G	GS	A	(a-19)	(a-3)	GS	GS	CE	AT	AG	(a-6)
Tennessee	CE	(y)	CL	SC	CL	G	G	G	G	A	B	G	(a-10)	CL	A	G	A
Texas	CE	CE	GS	CE	CE	GS	...	SE	BS	G	B	G	GS	CE	AT	B	B
Utah	CE	CE	(a-1)	CE	CE	G	GS	GS	GS	G	B	GS	(a-10)	(a-19)	AG	BA	AG
Vermont	CE	CE	CE	SE	CE	SL	GS	GS	GS	GS	AT	A	GS	AGS	AT	GS	CS
Virginia	CE	CE	GB	CE	GB	GB	GB	GB	B	GB	...	(a-24)	A	GB	(a-7)	GB	GB
Washington	CE	CE	CE	CE	CE	GS	GS	GS	(aa)	GS	B	GS	(a-10)	(a-4)	AT	GS	B
West Virginia	CE	...	CE	CE	CE	GS	A	CE	GS	(bb)	GS	GS	A	CE	AT	GS	A
Wisconsin	CE	CE	CE	CE	CE	G	GS	B	GS	A	A	(dd)	A	A	(a-3)	A	(a-19)
Wyoming	CE	...	CE	GS	CE	G	G	B	G	G	...	G	(a-10)	(a-31)	AT	BG	A

Note: The chief administrative officials responsible for each function were determined from information given by the states for the same function as listed in *State Administrative Officials Classified by Function, 1983-84*, published by The Council of State Governments.

Key:
... —No specific chief administrative official or agency in charge of function.
CL —Constitutional, elected by legislature
SE —Statutory, elected
SL —Statutory, elected by legislature
L —Selected by legislature or one of its organs
SC —Statutory, elected by state supreme court

Appointed by:	Approved by:
G —Governor	
GS —Governor	Senate
GH —Governor	Both houses
GE —Governor	Either house
GC —Governor	Council
GD —Governor	Departmental board
GLS —Governor	Appropriate legislative committee & senate
GLG —Governor & Lt. governor	
GGC —Governor & council of cabinet	
LG —Lieutenant governor	
AT —Attorney general	
SS —Secretary of state	

Appointed by:	Approved by:
AT —Attorney general	
A —Agency head	
AB —Agency head	Board
AG —Agency head	Governor
AGC —Agency head	Governor & council
AS —Agency head	Senate
ALS —Agency head	Appropriate legislative committee & senate
AGS —Agency head	Governor & senate
ASH —Agency head	Senate president & house speaker
B —Board or commission	
BG —Board	Governor
BGC —Board	Governor & council
BGS —Board	Governor & senate
BS —Board or commission	Senate
BA —Board or commission	Agency head
CS —Civil Service	
ACB —Nominated by audit committee	Both houses

(a) Chief administrative official or agency in charge of function:
(a-1) Lieutenant Governor
(a-2) Secretary of State
(a-3) Attorney General
(a-4) Treasurer
(a-5) Adjutant General
(a-6) Administration
(a-7) Agriculture
(a-8) Banking
(a-9) Budget
(a-10) Commerce
(a-11) Community Affairs
(a-12) Comptroller
(a-13) Consumer Affairs
(a-14) Disaster Preparedness
(a-15) Education (chief state school officer)
(a-16) Employment Services
(a-17) Energy Resources
(a-18) Environmental Conservation
(a-19) Finance
(a-20) Fish and Game
(a-21) General Services
(a-22) Health
(a-23) Highways
(a-24) Industrial Development
(a-25) Insurance
(a-26) Labor and Industrial Relations
(a-27) Natural Resources
(a-28) Parks and Recreation
(a-29) Personnel
(a-30) Planning
(a-31) Post Audit
(a-32) Public Utility Regulation
(a-33) Purchasing
(a-34) Social Services
(a-35) Taxation
(a-36) Transportation

(b) Responsibilities shared by Director of the Development Division within the Office of Economic Planning and Development and chief administrative official listed under Industrial Development.

(c) Responsibilities shared by Director of the Planning Division within the Office of Economic Planning and Development and Director of the Development Division within the same office, listed under Commerce. The Director of the Planning Division is also responsible for the function Planning.

(d) Numerous boards and commissions responsible for function.

(e) Responsibilities shared by the chief administrative officials listed under the following functions: Industrial Development and Tourism.

(f) Solid Waste Management Board is composed of nine voting members; seven appointed by the governor subject to Senate confirmation; one each appointed by the speaker of the Assembly and the Senate Committee on Rules.

(g) Not a state employee.

(h) See entry under Pre-Audit.

(i) Function performed by eight-member board (GS). Four members are nominated by governor and four are nominated by highest ranking constitutional officer of the p[illegible] appointee, but of the Executive director of the board [illegible] by the board.

(j) Due to reorganization, [illegible] responsibility for this function will be shared by the [illegible] person of the Illinois Labor Relations Board, the chairperson of the Illinois Labor Board, and the Director of the Department of Labor.

(k) Responsibilities shared by [illegible] administrative officials in the following functions: Health and Natural Resources.

(l) Responsibilities shared by [illegible] Treasurer of the Bureau of Elections within the Department of the Treasury, and Director of Government Services within the same department.

(m) Responsibilities shared by [illegible] Commissioner of the Department of Public Safety, and Chief of State Police Division within the same department.

(n) Responsibilities shared by the following administrative officials: Director of Accounting Division within the Department of Administrative Services, State Budget Administrator of the Budget within the same department, [illegible] Budget Analyst of the Budget counts, listed under Post Audit, and State Tax Commissioner of the Department of Revenue, listed under Taxation.

(o) Responsibilities shared by Director of Employee Relations and President of the Civil Service Commission.

(p) No central planning agency. Responsibilities shared by the Departments of Commerce, State and Transportation, the State Planning Office, and the Tri-State Regional Planning Commission.

(q) Responsibilities shared by the Director of the Office of Management and Budget and Executive Budget Analyst of the same office. Director of Management and Budget is also responsible for the function Post Audit.

(r) Responsibilities shared by [illegible] administrative officials: Budget and by the Director of the Accounting Commissioner [illegible] (L) and the state auditor (CL).

(s) Responsibilities shared by the Executive Budget analyst and Director of Department of Commerce.

(t) Responsibilities shared by [illegible] Director of the Public Utilities and Executive Director of the same Commission.

(u) Federal government employee.

(v) Responsibilities shared by the Director of Finance and Administration and Director of Public Welfare, and the Division of Children and Youth Services within the same department.

(w) Each profession has its own [illegible] board.

(x) Speaker of the Senate has the authority to [illegible] and is elected by the Senate from among its membership.

(y) Solid Waste Commission [illegible] of 11 members appointed by the speaker (from among the [illegible] Senate; and nine appointed by the governor (with the chairman from the group).

(aa) Responsibilities shared by Commissioner of Banking and Director of Savings and Loan.

(bb) Responsibilities shared by the Commissioner of the Department of Finance and Administration, Director of Finance and the Education Director within the same department.

(cc) Responsibilities shared by the Commissioner of the Department of Employment Security and Director of the Employment Service within the same department.

Table 12
ATTORNEYS GENERAL: PROSECUTORIAL AND ADVISORY DUTIES

State or other jurisdiction	Authority in local prosecutions: Authority to initiate local prosecutions	Authority in local prosecutions: May intervene in local prosecutions	Authority in local prosecutions: May assist local prosecutor	Authority in local prosecutions: May supersede local prosecutor	Issues advisory opinions: To state executive officials	Issues advisory opinions: To legislators	Issues advisory opinions: To local prosecutors	Issues advisory opinions: On the interpretation of statutes	Issues advisory opinions: On the constitutionality of bills or ordinances	Reviews legislation: Prior to passage	Reviews legislation: After passage
Alabama	A	A,D	A,D	A	*	*	*	*	*	*	.
Alaska	(a)	(a)	(a)	(a)	*	*	...	*	*	*	*
Arizona	A,B,C,D,F	B,D	B,D	B	*	*	*	*	*	*	.
Arkansas	...	D	D	...	*	*	*	*	*	*	*
California	A, E	A,D,E	A,B,D	A	*	*	*	*	*	*	*
Colorado	B,F	B	D,F(b)	B	*	*	*	*	*	*	*
Connecticut	...	...	...	...	*	...	...	*	*	*	*
Delaware	...	...	...	...	*	*	...	*	*	*	*
Florida	F	D	D	...	*	*	*	*	...	*	*
Georgia	A,B,F	A,B,D,G	A,B,D,F	B	*	*	*	*	...	*	*
Hawaii	E	A,D,G	A,D	A,G	*	*	*	*	*	*	*
Idaho	A,D,F	A	A D	A	*	*	*	*	...	*	*
Illinois	A,D,E,F,G	A,D,E	A,D,E,F	F	*	*	*	*	*	(c)	(c)
Indiana	F(b)	...	A,D,E,F	G	*	*	...	*	...	*	*
Iowa	D,F	D	D	...	*	*	*	*	*	*	*
Kansas	B,C,D,F	D	D	A,F	*	*	*	*	*	*	*
Kentucky	A,B	B,D	B,D,F	G	*	*	*	*	*	*	...
Louisiana	G	G	D	G	*	*	*	*	*	*	*
Maine	A	A	A	A	*	*	...	*	*	*	*
Maryland	B,C,F	B,C,D	B,C,D	B,C	*	*	*	*	*	*	*
Massachusetts	A,B,C,D,E,F,G	A,B,C,D,E,G	A,B,C,D,E	A,B,C,E	*	*	...	*	*	*	*
Michigan	A	A	D	A	*	*	*	*	*	*	*
Minnesota	B	B,D,G	A,B,D	B	*	*	...	*	...	...	(c)
Mississippi	B,E,F	...	B,F	...	*	*	*	*	*	(c)	(c)
Missouri	F	...	B	...	*	*	*	*	...	*	*
Montana	C,F	A,B,C,D	A,B,C,D,F	A,C	*	*(d)	*	*	*	...	...
Nebraska	A	A	A,D	A	*	*	*	*	*	...	...
Nevada	D,F,G(e)	D(e)	(e,f)	G,f	*	...	*	...	...	...	...
New Hampshire	A	A	A	A	*	...	...	*	*	*	*
New Jersey	A	A,B,D,G	A,D	A,B,D,G	*	*	*	*	*	*	*
New Mexico	A,B,E,F,G	B,D,G	D	B	*	*	*	*	*	*	*
New York	B,F	B	D	B	*	...	...	*	*	...	*
North Carolina	...	D	D	...	*	*	*	*	*	*	...
North Dakota	A,G	A,D	A,D	A	*	*	*	...	...	...	(c)
Ohio	B,C,F	B,I	F	B,C	*	*(g)	*	*	...	...	...
Oklahoma	B,C	B,C	B,C	B,C	*	*	*	*	*	*	*
Oregon	B,F	B,D	B,D	B	*	*	*	*	*	(c)	(c)
Pennsylvania	A,D,G	D,G	D	G	*	...	...	*	...	*	*
Rhode Island	A	D	D	...	*	...	...	...	...	...	...
South Carolina	A	A,D	A,D	A	*	*	*	*	*	*	*
South Dakota	A(h)	A	A	A	*	*	*	*	...	*	*
Tennessee	D,F,G(b)	D,G(b)	D	F	*	*	*	*	*	(c)	(c)
Texas	F	...	D	...	*	*	*	*	*	*	*
Utah	A,B,D,E,F,G	E,G	D,F	E	*	...	*	*	*	(c)	(c)
Vermont	A	A	A	A	*	*	*	*	*	*	*
Virginia	B,F	A,B,D,F	B,D,F	B	*	*	*	*	*	*	*
Washington	B,D,G	B,D,G	D	B	*	*	*	*	*	*	*
West Virginia	...	...	D	...	*	*	*	*	*	(i)	(i)
Wisconsin	B,C,F	B,C,D	D	B,C(j)	*	*	*	*	*	(i)	(i)
Wyoming	B,D(e)	B,D	B,D	...	*	*	*	*	...	*	*
American Samoa	A,E	A,E	A,E	A,E	*	*	...	*	*	*	*
No. Mariana Is.	A	...	...	...	*	*	...	*	*	*	*
Puerto Rico	A,B,E	A,B,E	A,E	A,B,E	*	*	...	*	*	*	*
Virgin Islands	A	...	...	...	*	*	...	*	*	*	*

Key:
A—On own initiative.
B—On request of governor.
C—On request of legislature.
D—On request of local prosecutor.
E—When in state's interest.
F—Under certain statutes for specific crimes.
G—On authorization of court or other body.
*—Has authority in area.
. . .—Does not have authority in area.

(c) Only when requested by governor or legislature.
(d) To legislative leadership.
(e) In connection with grand jury cases.
(f) Will prosecute as a matter of practice when requested.
(g) To legislature as a whole not individual legislators.
(h) Has concurrent jurisdiction with states' attorneys.
(i) No legal authority, but sometimes informally reviews laws at request of legislature.
(j) If the governor [illegible] the district attorney [illegible] case

Table 13
ATTORNEYS GENERAL: CONSUMER PROTECTION ACTIVITIES AND SUBPOENA AND ANTITRUST POWERS

State or other jurisdiction	May commence civil proceedings	May commence criminal proceedings	Represents the state before regulatory agencies	Administers consumer protection programs	Handles consumer complaints	Subpoena powers (a)	Antitrust duties
Alabama	*	*	...	*	*	*	A, B
Alaska	*	*	*	*	*	*	B, C
Arizona	*	...	...	*	*	*	A, B, D
Arkansas	*	...	*	*	*	*	B, C, D
California	*	...	...	...	*	*	B, C, D
Colorado	*	*	*	*	*	*	B, C, D(b)
Connecticut	*	...	*	*	...	*	A, B, D
Delaware	*	*	*	*	...	*	A, B, C
Florida	*	*	...	*	*	*	A, B, C, D
Georgia	*	*	*	...	...	*	B, C, D
Hawaii	*	*	*	...	...	*	A, B, C, D
Idaho	*	...	*	*	*	*	D
Illinois	*	*	*	*	*	*	A, B, D
Indiana	*	...	...	*	*	...	B, C, D
Iowa	*	*	*	*	*	*	A, B, C, D
Kansas	*	*	*	*	*	*	B, C, D
Kentucky	*	*	*	*	*	(c)	A, B, D
Louisiana	*	...	*	...	*	*	B, C
Maine	*	*	*	*	*	*	B, C
Maryland	*	*	*	*	*	*	B, C, D
Massachusetts	*	*	*	*	*	*	A, B, C, D
Michigan	*	*	*	*	*	*	A, B, C, D
Minnesota	*	...	*	*	*	*	B, D
Mississippi	*	...	*	*	*	*	B, C
Missouri	*	...	...	...	*	*	A, B, C, D
Montana	*	*	*	...	...	*	B, C, D
Nebraska	*	...	*	*	*	*	A, B, C(d), D
Nevada	*	*	...	...	*	*	A, B, C, D
New Hampshire	*	*	*	...	*	*	B, C, D
New Jersey	*	*	*	*	*	*	A, B, C, D
New Mexico	*	*	*	*	*	*	A, C
New York	*	*	...	...	*	*	A, B, C, D
North Carolina	*	...	*	*	*	*	A, B, C, D
North Dakota	*	*	...	*	*	*	C, D
Ohio	*	*	*	*	*	*	B, C, D
Oklahoma	*	...	(c)	*	*	*	B, D
Oregon	*	*	(c)	*	*	*	A, B, C, D
Pennsylvania	*	...	*	*	*	*	D
Rhode Island	*	*	*	*	*	*	A, B, C, D
South Carolina	*	*	*	...	*	*	A, B, C, D
South Dakota	*	*	...	*	*	*	A, B, C, D
Tennessee	*	*	*(c)	*	*	*	A, B, C, D
Texas	*	...	*	*	*	*	B, D
Utah	*(d)	...	*(d,f)	...	*(f)	*	A(g), B, C, D(g)
Vermont	*	*	*	*	*	*	A, B, C, D
Virginia	*	(c)	*	*(f)	*(f)	*	A, B, C, D
Washington	*	...	*	*	*	*	A, B, D
West Virginia	*	...	*	*	*	*	A, B, D
Wisconsin	*	...	*	*	*	*	A, B, C, D
Wyoming	*	...	...	*	*	...	...
American Samoa	*	*	*	...	...	*	...
Northern Mariana Is.	*	*	*	*	*	*	B, C, D
Puerto Rico	*	*	*	*(e)	*(e)	*	A, B, C
Virgin Islands	*	*(h)	*	...	...	*	A, B(i), C, D

Key:
A—Has *parens patriae* authority to commence suits on behalf of consumers in state antitrust damage actions in state courts.
B—May initiate damage actions on behalf of state in state courts.
C—May commence criminal proceedings.
D—May represent cities, counties and other governmental entities in recovering civil damages under federal or state law.
*—Has authority in area.
. . .—Does not have authority in area
(a) In this column only: * broad powers and • limited powers.
(b) Only under Rule 23 of the Rules of Civil Procedure.
(c) When permitted to intervene.
(d) Attorney general has exclusive authority.
(e) To a limited extent.
(f) Attorney general handles legal matters only with no administrative handling of complaints.
(g) Opinion only, since there are no controlling precedents.
(h) May prosecute in inferior courts. May prosecute in district court only by request or consent of U.S. Attorney General.
(i) May initiate damage actions on behalf of jurisdiction in district court.

Table 14
ATTORNEYS GENERAL: DUTIES TO ADMINISTRATIVE AGENCIES AND MISCELLANEOUS DUTIES

State or other jurisdiction	Serves as counsel for state	Appears for state in criminal appeals	Duties to administrative agencies: Issues official advice	Interprets statutes or regulations	Conducts litigation: In behalf of agency	Conducts litigation: Against agency	Prepares or reviews legal documents	Represents the public before the agency	Involved in rule-making	Reviews rules for legality
Alabama	A, B, C	★ (a)	★	★	★	★	★	(b)	...	★
Alaska	A, B, C	★	★	★	★	★	★	...	★	★
Arizona	A, B, C	(c,d)	★	★	★	★	★	...	★	★
Arkansas	A, B, C	★ (a)	★	★	...	★	★	★	★	★
California	A, B, C	★ (a)	★	★	★	★	★	...	...	...
Colorado	A, B, C	★ (a)	★	★	★	★	★	...	★	★
Connecticut	A, B, C	...	★	★	★	...	★	...	★	★
Delaware	A, B, C	★ (a)	★	★	★	★	★	★	★	★
Florida	A, B, C	★ (a)	★	★	...	★	★	★	★	★
Georgia	A, B, C	(b,c)	★	★	★	★	★	...	★	★
Hawaii	A, B	(b,c)	★	★	★	★	★	★	★	★
Idaho	A, B, C	★ (a)	★	★	★	★	★	...	★	★
Illinois	A, B,* C	(b,c,e)	★	★	★	★	★	★	...	...
Indiana	A, B, C	★ (a)	★	★	★	...	★	...	★	★
Iowa	A, B, C	★ (a)	★	★	★	★	★	...	...	★
Kansas	A, B, C	★ (a)	★	★	★	★	★	...	...	★
Kentucky	A, B*, C	★	★	★	★	★	★	...	★	★
Louisiana	A, B, C	(c)	★	★	★	★	★	...	★	★
Maine	A, B, C	(b,d)	★	★	★	...	★	...	★	★
Maryland	A, B, C	★	★	★	★	(b)	★	★	★	★
Massachusetts	A, B, C	(b,c,d)	★	★	★	★	★	★	★	★
Michigan	A, B, C	(b,c,d)	★	★	★	...	★	★	...	★
Minnesota	A, B, C	(c)	★	★	★	★	★	★	...	★
Mississippi	A, B, C	★	★	★	★	...	★	...	★	★
Missouri	A, B, C	★	★	★	★	...	★	...	★	★
Montana	A, B, C	★	★	★	★	...	★	...	★	★
Nebraska	A, B, C	★	★	★	★	★	★	...	...	★
Nevada	A, B, C	★ (d)	★	★	★	...	★	★	★	★
New Hampshire	A, B, C	★ (a)	★	★	★	★	★	★	★	★
New Jersey	A, B, C	★ (d)	★	★	★	★	★	...	★	★
New Mexico	A, B, C	★ (a)	★	★	★	★	★	★	★	★
New York	A, B, C	(b)	★	★	★	...	★	★	...	...
North Carolina	A, B, C	★	★	★	★	★	★	(b)	★	★
North Dakota	A, B, C	(b)	★	★	★	...	★	★	★	★
Ohio	A, B, C	...	★	★	★	★	★	★	★	...
Oklahoma	A, B, C	(b)	★	★	★	★	★	★	★	★
Oregon	A, B, C	★	★	★	★	...	★	...	★	★
Pennsylvania	A, B, C	(c)	★	★	★	★	★	...	★	★
Rhode Island	A, B, C	★ (a)	★	★	★	...	★	★	★	★
South Carolina	A, B, C	★ (d)	★	★	★	...	★	...	★	★
South Dakota	A, B, C	★ (a)	★	★	★	...	★	...	★	★
Tennessee	A, B, C	★ (a)	★	★	★	...	★	(b)	★	★
Texas	A, B, C	(c)	★	★	★	★	★	...	★	★
Utah	A, B, C	★ (a)	★	★	★	★	★	★	★	★
Vermont	A, B, C	(b)	★	★	★	★	★	(b)	...	★
Virginia	A, B, C	★ (a)	★	★	★	★	★	★	★	★
Washington	A, B, C	(c,f)	★	★	★	★	★	★	★	★
West Virginia	A, B, C	★ (a)	★	★	★	(f)	★	★	★	...
Wisconsin	A, B, C	(b)	★	★	★	★	★	(b)	★	...
Wyoming	A, B, C	★ (a)	★	★	★	...	★	...	★	★
American Samoa	A, B, C	★ (a)	★	★	★	...	★	...	★	★
Northern Mariana Is.	A, B, C	★	★	★	★	...	★	...	★	★
Puerto Rico	A, B, C	★	★	★	★	...	★	...	★	★
Virgin Islands	A, B, C(g)	★	★	★	★	...	★	...	★	★

Key: A—Defend state law when challenged on federal constitutional grounds.
B—Conduct litigation on behalf of state in federal and other states' courts.
C—Prosecute actions against another state in U.S. Supreme Court.
*only in federal courts

(a) Attorney general has exclusive jurisdiction.
(b) In certain cases only.
(c) When assisting local prosecutor in the appeal.
(d) Can appear on own discretion.
(e) In certain courts only.
(f) If authorized by the governor.

Table 15
STATE CABINET SYSTEMS

State	Authorization for cabinet system: Statute	Constitution	Governor	Tradition	Criteria for membership: Appointed to specified office	Elected to specified office	Gubernatorial appointment regardless of office	Number of members in cabinet (including governor)	Frequency of cabinet meetings	Open cabinet meetings
Alabama	...	...	...	★	...	...	★	24	Gov.'s discretion	★
Alaska	...	...	★	...	★	...	...	17	Regularly	★ (a)
Arizona	...	...	★	...	★	...	...	15	Every two weeks	...
Arkansas	★	...	...	...	★	...	★	17	Monthly	...
California	...	...	★	...	★	...	★	11	Every two weeks	...
Colorado	...	★	...	...	★	...	...	20	Monthly	★
Connecticut	★	...	...	...	★	...	...	15	Gov.'s discretion	★ (a)
Delaware	★	...	...	...	...	...	★ (b)	16	Gov.'s discretion	★
Florida	...	★	...	...	...	★	...	7	Every two weeks	★
Georgia	----------						(c)			
Hawaii	★	...	...	...	★	...	...	18	Gov.'s discretion	...
Idaho	----------						(c)			
Illinois	...	...	...	★	★ (b)	...	...	21	Gov.'s discretion(d)	★
Indiana	----------						(c)			
Iowa	★	...	...	...	...	★	...	5	Weekly	★
Kansas	...	...	★	...	...	...	★	14	Monthly	★
Kentucky	★	...	...	...	★	...	...	18	Weekly	...
Louisiana	----------						(c)			
Maine	...	...	...	★	...	...	★ (b)	22	Monthly	(e)
Maryland	★	...	...	...	★ (b)	...	...	23	Gov.'s discretion	...
Massachusetts	★	...	...	...	★	...	...	13	Twice monthly	...
Michigan	...	...	★	...	...	...	...	25	Monthly	(f)
Minnesota	...	...	★	...	★	...	...	24(g)	Every two weeks	★
Mississippi	----------						(c)			
Missouri	----------						(c)			
Montana	...	...	★	...	★	...	...	15	4-6 times a year	★
Nebraska	...	...	★	...	★	...	...	27	Weekly	...
Nevada	----------						(c)			
New Hampshire	----------						(c)			
New Jersey	...	★	...	...	★	...	...	21	Once or twice monthly	(h)
New Mexico	★	...	...	...	★	...	...	12	Monthly	★
New York	...	...	...	★	★	...	...	22	Gov.'s discretion	...
South Carolina(i)	...	...	★	...	...	...	★	11	Weekly	...
South Dakota	----------						(c)			
Ohio	★	...	...	...	★	...	★	27	Every two weeks	(e)
Oklahoma	...	...	★	...	...	...	★	8(j)	Gov.'s discretion	...
Oregon	...	...	★	...	★	...	...	11	Weekly	...
Pennsylvania	★	...	...	...	★	...	...	19	Gov.'s discretion	★
Rhode Island	----------						(c)			
South Carolina	----------						(c)			
South Dakota	...	...	★	...	★	...	★	23	Gov.'s discretion	...
Tennessee	...	...	...	★	★	...	...	21	Gov.'s discretion(k)	(f)
Texas	----------						(c)			
Utah	...	...	...	(l)	(l)	...	...	(l)	(l)	★
Vermont	...	...	★	...	...	...	★	19	Gov.'s discretion	...
Virginia	★	...	...	...	...	...	★	8	Gov.'s discretion(k)	...
Washington	...	...	★	...	...	...	★	26	Every 6-8 weeks	★ (f)
West Virginia	----------						(c)			
Wisconsin	----------						(c)			
Wyoming	----------						(c)			

Key:
★—Yes
...—No
(a) Except when in executive session.
(b) With the consent of Senate.
(c) No formal cabinet system. In Idaho, however, sub cabinets have been formed, by executive order; the chairmen report to the governor when requested.
(d) Sub cabinets meet monthly.
(e) In practice, the media and others do not attend, but cabinet meetings have not been formally designated closed.
(f) In Michigan and Tennessee closed, with some exceptions. In Washington, open with some exceptions.
(g) Five sub-cabinets have been formed.
(h) Closed to press, open to staff.
(i) Constitution provides for a Council of State made up of elective state administrative officials, which makes policy decisions for the state while the cabinet acts more in an advisory capacity.
(j) Each cabinet member is chair of a sub cabinet (each state agency). These sub-cabinets meet quarterly.
(k) More often during legislative sessions, Tennessee—weekly.
(l) State Planning Advisory Committee, composed of all department heads serves as an informal cabinet. Committee meets at discretion of state planning coordinator.

OUTLINE OF REMARKS

Attorney General Clarence A. H. Meyer

ATTORNEY GENERAL SHOULD BE ELECTED - NOT APPOINTED

I. "ATTORNEY GENERAL OF U. S. IS APPOINTED." (Little Hoover: "As in the federal government, the chief executive of the state should have the right to choose his cabinet officers.")

A. Vast difference. U.S. A. G. has broad administrative and policy-making functions in connection with the many bureaus placed in the Dept. of Justice -- Immigration & Nat; Narcotics Bureau; Bureau of Prisons; Parole; FBI -- Whereas we are law office -- not policy making.

B. U.S.A.G. is carry over from English government. There first known as Attornati Regis, the king's counsel. Function was to protect the king's privileges, lands and estates and to quell civil disturbances among the people in order to keep the king on the throne.

C. SIR THOMAS MORE ("A Man for All Seasons") beheaded by Henry VIII because he would not write an opinion the way the king wanted it.

D. At common law, the function of the Attorney General was to safeguard the powers of the monarch - here this is not the case.

II. "GOVERNOR SHALL TAKE CARE THAT THE AFFAIRS OF THE STATE ARE EFFICIENTLY AND ECONOMICALLY ADMINISTERED."

A. If Governor feels he needs lawyers of his own choosing to help run the state, he has authority under existing law to hire all the lawyers he wants to.

B. He can authorize any state officer or department to employ its own counsel in any litigation.

C. Present and previous Governors have appointed men with legal training on their staff - those men can and do advise the Governor and the Departments under him. (Yeutter & Barnett)

D. But, would the Legislators want to go to the Governor's appointees for legal advice and opinions in all situations? Keep in mind that the Attorney General is also the advisor to the Legislature. (As well as being an officer of the Supreme Court.)

E. A very substantial part of the work of the Attorney General is in areas in which the Governor has little or no interest, official or otherwise. A great deal of our work is with the counties -- we must advise the county attorneys. Nor does he have a day-to-day interest in the criminal cases we handle in the Supreme Court. (We had 290 cases in the Supreme Court in last 2 years). (No need for Governor to control or supervise us in this work.)

III. "WILL PROMOTE GREATER 'HARMONY' AS WELL AS EFFICIENCY."

A. Have served under both Republican and Democratic Governors over the years and there never has been any lack of harmony. We don't give Democratic advice or Republican advice - we give legal advice.

B. Must keep in mind that not just the giving of legal advice to the Governor is involved. We give legal advice to the many departments which are under his complete control -- and these are the departments which people contact every day - motor vehicles, agriculture, etc. Atty. Gen. Lefkowitz of New York: "All of the various departments and agencies of government turn to the Atty. Gen. for legal advice and for the rendering of official opinions. Such opinions are acted upon daily and a great deal of the operation of the state government depends upon the nature of the advice that is so rendered. These opinions are rendered to all departments of the State government, those under the direction and supervision of the Governor and those under the direction of other elected officials. It is important to note that the opinions have a direct and significant impact upon the People in their daily life. Here is a compelling reason why the Atty. Gen. should continue to be independently elected. If the Atty. Gen. is appointed by the Governor, then of necessity his opinions must reflect the philosophy of that Governor or the relationship would not be a compatible one."

C. The late Joseph T. Votava in 1920: "The appointment of an Atty. Gen. would make him a private counsel of the Governor, and I do not think the people of the state want that. They want someone in addition to the Governor in the Executive Department, who would see that the rights of the people are protected."

D. "BUSINESS APPOINTS ITS LAWYERS."
Businesses are organized for profit to its owners and officers, and not necessarily for the profit of the people they serve.

E. "YOU GET BETTER MEN BY APPOINTMENT."
A Governor will be the first to admit that he makes mistakes in his appointments.

F. "GOVERNOR NEEDS TO APPOINT ATTORNEY GENERAL BECAUSE GOVERNOR IS RESPONSIBLE UNDER OUR CONSTITUTION TO SEE THAT THE LAWS ARE ENFORCED."
Primary responsibility is with county attorneys, sheriffs, police and the State Patrol. The Patrol is already under the direct supervision of the Governor, and he has the power to suspend any sheriff, county attorney, police commissioner, mayor, or any other officer who refuses to enforce the law.

G. CONCLUSION. O.S. SPILLMAN in 1920: "* * * I am afraid that we have not arrived at that point in our affairs in this state where we want the head of the government to appoint the Attorney General. If there is any man who holds office in this state and who should be elected by, and responsible to the people of the state, it should be the Attorney General. The head of the state may have good judgment in his appointment, he may be able, from his experience, to appoint an excellent man to act as Attorney General, but I do not believe, under ordinary circumstances, that the judgment of one man is better than the combined judgment of the electors of the State of Nebraska on that proposition, and an Attorney General should be a check upon all the officers in the state, and he should be free, if necessary, to proceed against any department or against any officer in the state. I do not want his hands tied; I do not want him to be responsible to any individual or to any particular department. I want him free in the discharge of his duties."

The Key to Judicial Merit Selection: The Nominating Process

by

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The American Judicature Society

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Introduction

Judges and justice. Both words stem from the Latin *jus*, right or law. Linked by their semantic origin, the words remain closely related. Perhaps it is overstatement to contend that the quality of our judges is the quality of our justice. Nevertheless, it cannot be disputed that the quality of justice in our society depends to a great extent on the ability of our judges. While a highly qualified judiciary cannot by itself assure justice, at the very least it helps assure that justice will not be compromised because of unqualified judges.

How should judges be selected? Historically, America has attempted to answer this question by employing a variety of selection methods. Early in our nation's history, judges were appointed by the executive or legislature. Although federal judges and judges in some states continue to be appointed by the executive with the advice and consent of the legislature, the direct popular election of state judges became popular during the Jacksonian era of the nineteenth century. However,

later in the century a reaction against the overtly and overly political nature of these elections led to nonpartisan judicial elections. More recently, many states have adopted selection processes which seek to combine the advantages of both the appointive and elective methods.

States and municipalities still seek to build upon and improve the judicial selection methods used by prior generations. Like most institutional arrangements that are responsive to the needs of society, judicial selection demands an on-going process that borrows and profits from the past, meets the needs of the present and remains flexible to permit future adaptation.

The form of state judicial selection that has expanded most dramatically in the past twenty-five years is the non-partisan merit selection plan. Used in only one state prior to 1950, the non-partisan merit selection plan (as defined herein) currently is being used, in whole or in part, in twenty-one states, the Commonwealth of Puerto Rico, the District of Columbia, and the territory of Guam.

The rapid expansion of this selection method and its current consideration by many state legislatures indicate a strong trend toward the adoption of the plan. However, the debate over judicial selection still is being waged in a factual vacuum. This study seeks to help fill that vacuum by providing the first national empirical analysis of the judicial nominating commission. These commissions are the distinguishing and most important component of the non-partisan merit selection plan. Composed of lawyers and non-lawyers, the commission submits a list of judicial nominees to the exec ve who then selects the judge.

Two principal research techniques were employed in this study: on-site field investigations in selected merit plan jurisdictions and a questionnaire survey of nominating commissioners in most merit plan jurisdictions. In 1973, on-site field investigations were conducted in five jurisdictions: Birmingham, Alabama; Alaska; Colorado; Kansas; and New York City. The immediate objective of these field investigations was to learn how judicial nominating commissions actually operate. A secondary objective was to analyze and contrast procedures from several jurisdictions in order to evaluate the commissions' strengths and weaknesses.

The five jurisdictions studied in Part II differ in geography, urban density, ethnic and racial composition, and political culture. Furthermore, although each jurisdiction has adopted

some form of the non-partisan merit selection plan, each plan has been developed to suit the particular circumstances and needs of the individual jurisdiction. Similarly, the organization and operation of judicial nominating commissions in these jurisdictions vary considerably.

At the outset of our study we realized that it would be impracticable to conduct research in each of the five jurisdictions in exactly the same manner. To do so would be unduly confining, and would risk overlooking the unique features of each commission. However, we also felt that a basis for comparison between these states and those merit selection plan states not included in the field investigations was needed. To implement this objective, a lengthy questionnaire was developed to serve as the focal point for such a comparison. In June of 1973 the questionnaire was mailed to all present members of judicial nominating commissions that had sufficient operating experience. The results of this nine-page questionnaire are set out in Chapters 2 and 3.

It should be underscored that this study does not seek to resolve the lively debate between those who defend the nonpartisan merit selection plan and those who prefer other methods of judicial selection. Our interest in merit selection stems not from our advocacy of the plan but from the undeniable fact that during the last twenty-five years this method of judicial selection has been the most widely adopted means of selecting state judges. It appears likely that this trend will continue. Whether this trend *should* continue demands a normative judgment that is beyond the scope of this study. What this study does offer is the first empirical look at judicial nominating commissions on a national basis. To that extent it should not only add considerably to existing information, but lay the foundation for the kinds of evaluative studies of the nonpartisan merit selection plan that will permit normative judgments.

Also, we hope that this study will be of practical value to persons actively involved in the implementation or operation of a judicial merit selection plan. Toward this end, the recommendations contained in chapter nine, particularly our Evaluation Scale of Judicial Applicants (page 232) and the Model Rules of Procedure for a Judicial Nominating Commission (Appendix 9-A), should prove useful.

Chapter 1

Overview of Judicial Selection Process

The following outline of the historical development and evolution of judicial selection methods in the United States is intended to help place in perspective the role and function of the judicial nominating commissions. After highlighting the earlier selection procedures, the nonpartisan merit selection plan will be analyzed in greater detail.

Early History: The Appointive Method

Like most of our legal institutions, our methods for selecting judges have their roots in England. The Revolution of 1688 against the Stuart kings of England led to a number of far-reaching changes in the distribution of power between the

*Particularly helpful sources for this historical sketch were: Dorothy Nelson, *Variations on a Theme—Selection and Tenure of Judges* 36 S. CAL. L. REV. 4 (1962); Glenn R. Winters, *Selection of Judges—An Historical Introduction* 44 TEXAS L. REV. 1081 (1966); and Evan Haynes, *Selection and Tenure of Judges* (National Conference of Judicial Councils, 1944)

monarch and other branches of government. The intolerably wide powers of the monarch over the appointment and removal of judges led to the Act of Settlement in 1701. Although the Act permitted the royal office to continue to commission the judges, two important checks were placed on the king. The judge's term of office was based upon good behavior, and more importantly, the removal of a judge was to be by address of both houses of parliament. No longer were judges viewed as merely serving at the pleasure and sole prerogative of the sovereign.

Throughout the early eighteenth century, the judicial office in England continued to gain independence. The final defeat of the theory of judges as mere adjuncts to the executive came in 1761 when a statute provided that judges were to continue in office even after the death of the appointing king.

Unfortunately, the Act of Settlement was not made applicable to the American colonies. The colonial judges were quite dependent upon the king. The Declaration of Independence notes quite simply, "He [George III] has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." After the American Revolution, the original thirteen states reacted against the selection of judges by executive appointment and overwhelmingly chose methods of selection that did not reflect the English colonial practice. In eight states the power of appointment was vested in one or both houses of the legislature. Two states allowed appointment by the governor and his council. In only three states was the power of appointment vested in the governor, and even then the power was subject to the consent of the council. Borrowing from the Act of Settlement, eight states based the judicial term of office on good behavior. Fixed terms were used in three states. Rhode Island did not define tenure, and Georgia allowed its General Assembly to decide the length of term.

At the Federal level, the only topic related to the judiciary that caused much debate at the constitutional convention of 1789 was the manner in which Federal judges were to be selected. Although executive appointment was ultimately adopted, certain safeguards were added to assure judicial independence. Article III, Sec. 1 of the Constitution provided, "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Thus the method of selecting judges in the early days of our republic was basically appointive. On the state level, the appointment power was vested in both the executive and legislative branches. On the Federal level, the power resided in the executive. While the Federal appointive method continues to be employed, this arrangement for judicial selection enjoyed only a brief period of dominance on the state level. The Jacksonian era of the nineteenth century introduced the elective method of selecting state judges.

The Jacksonian Era: The Elective Method

Beginning in the mid-1800's, the appointment of state judges by the executive or legislature was drastically curtailed. A basic principle of Jacksonian democracy was the equality in fact of all men. This principle was translated into a variety of political reforms, among them the notion that all public officials — including judges — should be elected.

Prior to the 1840's judges were elected infrequently and in only a few states. In 1832 Mississippi became the first state to elect all judges. By action of its constitutional convention in 1846, New York led the change from gubernatorial and legislative appointment to direct popular election. The century following New York's shift, all states that entered the Union did so with an elected judiciary. Even the four colonial states of Georgia, Maryland, Pennsylvania and Virginia joined the movement from an appointed to an elected judiciary. By the time of the Civil War, judges were elected in twenty-four of the thirty-four states. For the first time in Anglo-American history, the judicial office became an integral part of the political elective process.

Although the philosophical and political underpinnings of the Jacksonian movement toward "common man" democracy are beyond the scope of this historical sketch, it suffices to note that the full ramifications of the partisan elective system were not discernible immediately. However, toward the end of the nineteenth century the "returns" on this method of judicial selection were both unexpected and unsettling. The post-Civil War increase in industrialization and its accompanying urbanization were marked by the formation of political "machines" in the nation's larger cities. The Tammany Hall organization in New York exemplified the potential abuses of a system which

permitted partisan judicial contests on the ballot. By seizing control of the political processes that led to nomination. Tammany effectively was able to run and elect its slate of judicial nominees. The stranglehold which such organizations had over elections was tightened by general voter unfamiliarity with metropolitan judicial candidates.

Dissatisfaction and resentment of political party control of judicial candidates led to a counter-reform movement. The reaction of New York lawyers against the party method of nomination and election was instrumental in the establishment of the first bar association in the nation, the Association of the Bar of the City of New York, in 1870. A number of similar associations, including the American Bar Association, were formed within the following decade. Although the theme "to take the judge out of politics" grew more popular, the reforms sought by the bar leaders were confined largely to the concept of improving popular elections. Bar leaders attempted to control the power of political party organizations through a variety of devices, such as nonpartisan ballots, separate judicial nominating conventions and elections, and direct primaries. They also attempted to increase the influence of the legal profession on judicial selection by conducting and publishing bar association referenda with respect to their recommendations on the fitness of judicial candidates. These initial measures proved inadequate to remove the effective control of political party leaders over elections, although most states retained the election system, but the concern over the adverse effects of political selection on the quality of judicial personnel was increasingly voiced with the approach of the twentieth century.

The Twentieth Century: Search for a Synthesis

The clarion call for a frontal attack on the popular election of judges was sounded in 1906 by a young University of Nebraska law professor, Roscoe E. Pound. In an address before the American Bar Association, Pound noted that popular judicial elections were a major cause of public dissatisfaction with the administration of justice. Pound's direct assault on popular elections was continued by William Howard Taft, the ex-President of the United States and future Chief Justice of the U.S. Supreme Court. Speaking before the American Bar Association in 1913, Taft declared that even the nonpartisan judicial ballot was a failure. He asserted that such a system permitted unqualified persons who were incapable even of political support to become

elected through a vigorous campaign.

In that same year, the American Judicature Society was founded. Dedicated to the efficient administration of justice, the organization was particularly concerned with the methods of selection, tenure and retirement of judges. As director of research for this new organization, Albert M. Kales, a law professor at Northwestern University, set out to devise a method of judicial selection that would maximize the benefits and minimize the weaknesses of both the appointment and election processes. In essence, Kales sought to preserve the informed and intelligent choice which is the strong point of the appointive system, while retaining ultimate voter control.

The system devised by Kales and promoted by the American Judicature Society did combine appointments with election. It also added a very important third element—a judicial nominating commission. Under the Kales Plan, an elected chief justice would fill judicial vacancies from a list submitted by the commission which was expected to seek out the best available judicial talent. Once on the bench, these judges would thereafter go before the voters on the sole question of their retention. In form, this type of election is quite similar to a referendum, for it is noncompetitive and nonpartisan. In the event of a rejection, the resulting vacancy would be filled as before by commission nomination and chief justice appointment. In 1926, Harold Laski, an English political scientist, proposed as a slight variation of the Kales Plan that the governor be substituted for the chief justice as the appointing agent. The Kales-Laski proposal contained the basic features upon which most subsequent plans for judicial reform have been based. The three-part approach consisted of: (a) a judicial nominating commission to nominate candidates for the bench; (b) an elected official (usually from the executive branch) who would make his appointments from the list submitted by the commission; and (c) subsequent nonpartisan and noncompetitive elections in which judges so chosen would run on their records.

For nearly twenty-five years, the plan remained dormant and most states continued to elect their judges. In 1937, the American Bar Association endorsed the Kales-Laski proposal. Three years later it was voted into the constitution of Missouri and quickly became identified as the "Missouri Plan". However, the nation's concern throughout the 1940's was turned toward international matters and by mid-century, Missouri remained the only state to have adopted the plan.

Merit Selection: A Closer Examination

To speak of *the* merit plan for judicial selection oversimplifies and often misleads. A large number of states and cities have adopted a variety of "merit" plans. An inclusive definition of the plan that includes all of these jurisdictions necessarily becomes analytically imprecise. A framework is needed to distinguish and compare the various plans. Indeed, several frameworks could be used to classify the plan. Often classification schemes hinge upon whether a particular plan:

- applies to all courts, or only appellate courts or only trial courts;
- is statewide or local;
- is based upon constitution, statute, executive order, or the informal compliance of the executive.

While these classifications bring a semblance of order to the assortment of plans, they still do not provide an adequate framework for the purposes of this study. Given the primary concern of this study with the structure, procedures and duties of the judicial nominating commissions, the nonpartisan merit selection plan is defined for our purposes as a judicial selection system which employs:

A permanent nonpartisan commission of lawyers and nonlawyers that initially and independently generates, screens and submits a list of judicial nominees to an official who is legally or voluntarily bound to make a final selection from the list.

This definition immediately distinguishes the nonpartisan merit selection plan from those jurisdictions which continue to use the strict appointive or elective systems. The definition also *excludes:*

- Commissions which *confirm* or *review* candidates submitted to it by another governmental unit or individual. Judicial vacancies in California trial courts are filled in this manner; the various county commissions approve or disapprove of the candidates whom the governor's office voluntarily channels to the commissions.
- Commissions composed solely of bar association members. Four states presently employ plans that do not include nonlawyers on their commissions.
- Ad hoc committees which respond to unusual vacancy situations. In 1972 Massachusetts voters approved a constitutional amendment requiring judges to retire at age seventy. To fill the thirty-eight vacancies thus created, Governor Francis W. Sargent appointed the Ad Hoc Advisory Committee on Judicial Appointment. The Committee was disbanded after the appointments were made.

On the other hand, the definition *includes:*

- Commissions which operate on both state and local levels. For example, the only commission in New York State is the Mayor's Committee in New York City, which recommends nominees only for the city's local courts.
- Commissions initiated upon executive order or public announcement as well as those established by constitutional or statutory mandate.
- Commissions which are involved in all, or part, of a court system (trial, intermediate appellate, supreme). In Alaska, a single commission selects nominees for vacancies occurring in all the courts in the state. Maryland provides a single commission for appellate court vacancies and separate commissions for vacancies occurring in each of the eight district courts. Nebraska has separate commissions for each seat on the state's seven-man supreme court, separate district court nominating commissions in each of the state's twenty-one districts, separate county court nominating commissions in each of the state's judicial districts, a juvenile judge nominating commission, and a workmen's compensation court nominating commission.
- Plans which only fill judicial vacancies occurring between partisan or competitive election. Although Florida has commissions for the supreme court, intermediate courts of appeal, and circuit courts, these commissions nominate only for vacancies occurring between elections. A judge initially appointed to the bench under the state's merit plan must run in a nonpartisan election at the end of his term if he wishes to remain on the bench.

With the nonpartisan merit selection plan defined in this manner, we complete our judicial overview by charting the course of merit selection during the past quarter century.

The adoption of merit selection in the 1950's was gradual, with only three jurisdictions adopting the plan during this period. In the 1960's expansion was more rapid, with eight new jurisdictions adopting the plan. The movement has continued to gain momentum in the 1970's; ten jurisdictions already have chosen this form of judicial selection. In addition, a number of states and municipalities have adopted plans which do not quite fit our definition of merit selection but still incorporate features of the plan.

After the hiatus following the adoption of the Missouri Plan

in 1940, the *Alabama* constitution was revised in 1950 to provide for a nominating commission to fill interim vacancies in the circuit court of Jefferson County (Birmingham).[1] In 1958, the voters of *Kansas* approved a constitutional amendment establishing a merit selection plan. A supreme court nominating commission provided nominees whenever a vacancy in that court occurred.[2] The constitutional convention of *Alaska* adopted a model judicial article which included merit selection for all major trial and appellate judges. With statehood in 1959 Alaska became the first state to adopt merit selection with statewide application. Whenever a vacancy occurs in the supreme, superior, or district courts, the state's Judicial Council submits a list of nominees to the governor.

New York City was the first jurisdiction to opt for a merit plan in the 1960's. In 1961, Mayor Robert Wagner voluntarily pledged that he would fill certain judicial vacancies from a list submitted to him by a nominating commission. Mayor John V. Lindsay continued this practice. Mayor Abraham D. Beame has also stated that he will follow this same procedure.

In 1962, constitutional amendments in *Iowa* and *Nebraska* provided for merit selection of all major trial and appellate judges. Iowa now provides a supreme court nominating commission, separate district court commissions in each of its thirteen districts, and separate judicial magistrate "appointing" commissions in each of its ninety-nine counties. Nebraska provided separate supreme court commissions for each of that court's seven seats and separate district court commissions in each of its twenty-one districts.[3] Having used a judicial commission to aid the mayor in selecting Denver County judges since 1964, *Colorado* amended its constitution in 1966 to provide for merit selection on a statewide basis. A single commission encompasses all supreme court and intermediate appellate court vacancies; twenty-two district commissions are used for all other courts of record (except Denver).

Puerto Rico has filled all judicial vacancies by merit selection since 1965. The plan was implemented by special rules adopted by the Supreme Court of Puerto Rico and instituted by Governor

1. By constitutional amendment adopted in 1974, Madison County (Huntsville) now has such a plan. A new judicial article, adopted in 1974, gives fifteen Alabama counties the option of adopting similar plans.

2. Under a new judicial article adopted in 1972, Kansas voters in each judicial district will be given the option of extending the plan to the selection of their district court judges.

3. In 1974, Nebraska extended the plan to its county courts.

Sanchez-Vilella. Successive governors, Luis A. Ferre and Rafael Hernandez-Colon, have continued to use the plan.

The remaining states that implemented merit selection plans in the 1960's did so in 1967. *Idaho's* legislature adopted a statutory measure for filling supreme and trial court vacancies between elections under a merit selection plan using a single judicial council. But the plan is not used when vacancies occur at the end of judicial tenure. Under the Idaho plan all judges must run for office on nonpartisan elective ballots to succeed retiring incumbents or to retain their own offices.

Oklahoma's plan was written to cover only the judges of that state's supreme court and court of criminal appeals. However, the plan was extended by the voluntary action of former Governor Dewey F. Bartlett and more recently his successor, Governor David Hall, to cover judges of the trial courts and courts of limited jurisdiction. A single nominating commission is responsible for selecting nominees whenever a vacancy occurs in any judicial office.

The *Utah* constitution was amended in the mid-1940's to permit the legislature to change from the elective method of selecting judges. Utah judges continued to be elected, however, until 1967 when the legislature enacted a merit plan to fill all vacancies based on the recommendations of the supreme court commission or the district court nominating commissions.

The *Vermont* legislature had historically selected its supreme and trial court judges. Since 1967, a nominating commission has been used in making initial judicial selections for the supreme, superior and district courts.[4]

In 1970, *Maryland* led the way in formalizing voluntary merit selection through executive order. Governor Marvin Mandel's orders established a governor's commission on Appellate Judicial Selection to fill interim vacancies on the court of appeals or court of special appeals, and eight trial court judicial selection commissions to fill interim vacancies occurring in the trial courts in each of the state's eight judicial districts.

Three states provided some form of merit selection in 1971. The voluntary plan adopted by *Georgia's* Governor Jimmy Carter was designed in his formal executive order to cover only

4. By constitutional amendment, effective April 9, 1974, all commission recommendations are now passed on to the governor rather than the legislature. The governor's appointments are subject to confirmation by the state senate.

appellate court vacancies, but in actual practice the plan has also been used to fill trial court vacancies. However, it should be pointed out that, since the 1950's, state legislation (later the Atlanta home rule charter) has provided for merit selection for the city courts in Atlanta.

The merit plan approved by *Tennessee*'s legislature provided for a single nominating commission and covered the state's supreme court and appellate court judges.[5]

Under Governor Reubin O'D. Askew's executive order all appellate and trial court vacancies in *Florida* were filled by a voluntary merit selection plan. This plan was subsequently written into the state's revised judicial article of 1973. Its provisions apply to vacancies which occur between elections. Separate judicial nominating commissions were established for the supreme court, district courts of appeal (four) and circuit courts (twenty).

Indiana's plan for selecting all appellate judges was ratified as a part of a new judicial article in 1970 and became fully operative in 1972. While awaiting the referendum on the appellate judges, the Indiana legislature enacted a 1969 bill providing for merit selection of Indianapolis municipal court judges. Bills providing for merit selection of trial court judges were enacted in the 1971, 1972 and 1973 legislative sessions. The counties affected are Allen (with Ft. Wayne the county seat), Vanderburgh (with Evansville the county seat), Lake (with Hammond the county seat), and Marion (with Indianapolis the county seat). A single commission aids in appellate selections, and each of the four counties uses its own commission.

In 1972, *Montana* and *Wyoming* became the most recent states to adopt merit selection plans through constitutional changes, the former in a new constitution and the latter by amendment. Both states applied the plan to all major courts and used a single judicial nominating commission. In Wyoming, judges ran for retention on a nonpartisan and noncompetitive ballot at the end of their first year (and at the end of each term thereafter); Montana judges are appointed only for interim vacancies between competitive elections. By executive order, Governor John J. Gilligan of *Ohio* instituted a voluntary plan in the same year. The plan provided for twelve advisory councils, one for filling the supreme court vacancies and eleven district councils for filling court of appeals and trial court

5. However, the legislature repealed the plan's applicability to the supreme court in 1974.

vacancies within the eleven districts of the state. The plan is used to fill interim vacancies between elections.

Pennsylvania is the most recent jurisdiction to embrace the concept of merit selection by the voluntary action of a chief executive. In a 1973 executive order, Governor Milton J. Shapp called for two statewide commissions. One commission submits nominees to fill between-election vacancies on the appellate courts and the special Commonwealth Court. The second commission develops lists of nominees for use by the governor in filling interim vacancies on the trial court level. By congressional home rule legislation, approved by the voters in 1974, the *District of Columbia* became the most recent jurisdiction to adopt merit selection. When vacancies occur on the trial and appellate benches of the District of Columbia court system, the commission submits lists of three names to the President who must appoint from those lists in filling vacancies, subject to confirmation by the U. S. Senate.

Hybrid Merit Selection Plans: Bar Screening and Other Variations

In addition to the states which meet our definitional standard of nonpartisan merit selection, a number of states have plans that are similar but vary in some important respect from the nonpartisan merit plan. Several states make use of commissions composed of bar association members rather than both nonlawyers and lawyers. In 1951, Governor Edwin L. Mechem of *New Mexico* began to fill between-election appellate and trial court judicial vacancies based upon a list submitted by the unified state bar. This voluntary practice has been followed by all succeeding governors including the present incumbent, Governor Bruce King.

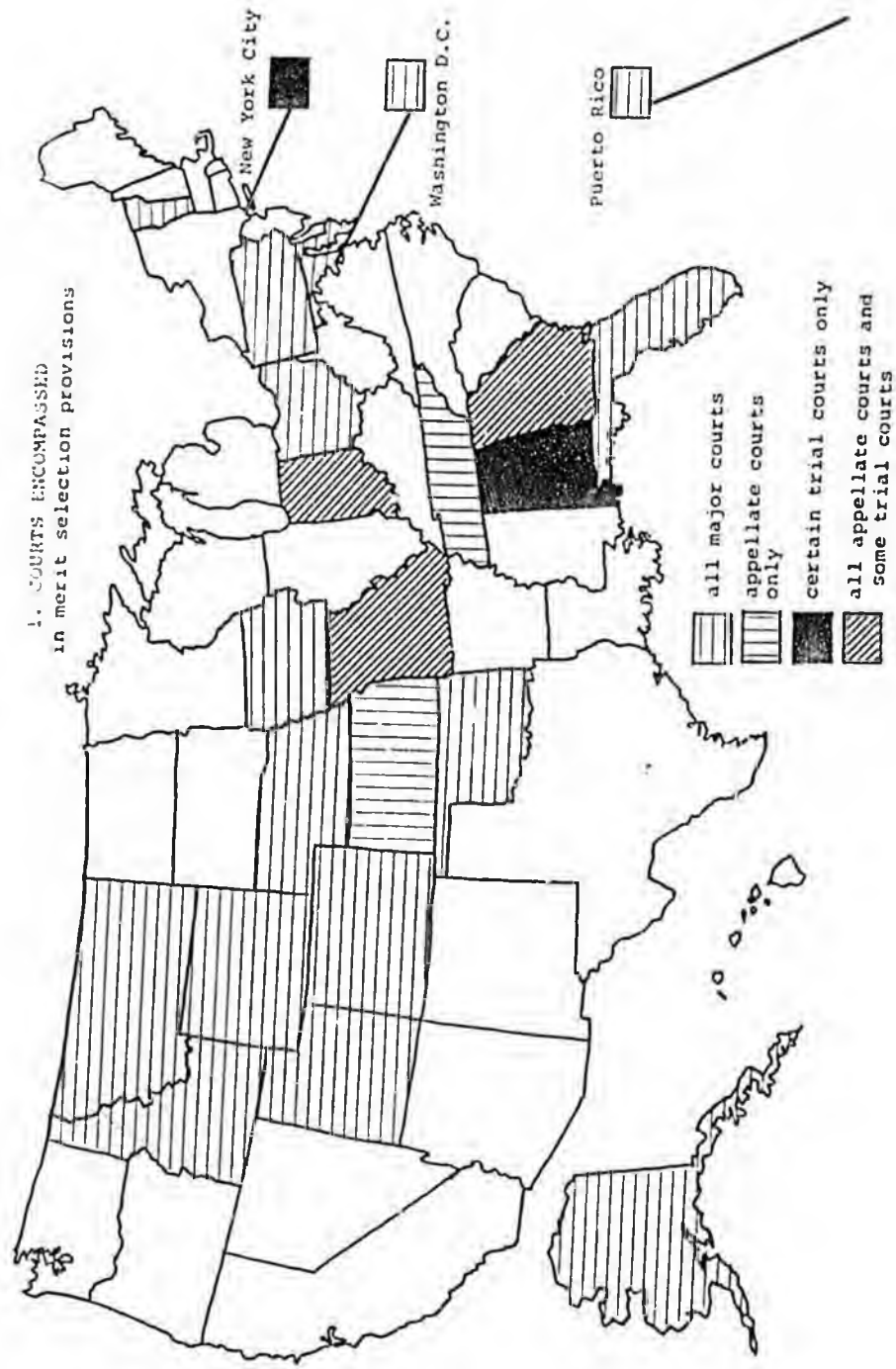
Under a voluntary plan initiated by former Governor Winthrop Rockefeller and continued by incumbent Governor Dale Bumpers, *Arkansas* also follows a "merit plan" using a bar association committee. The selection committee, specifically designated by the president of the Arkansas Bar Association, performs two major functions. Since state law prohibits judges who are appointed to fill vacancies from succeeding themselves, the selection committee screens lawyers interested in taking these short-term judicial appointments. The committee also nominates a slate from which the governor appoints attorneys to sit temporarily on the supreme court when a justice disqualifies himself from serving on a case.

New Jersey is a third state which employs a form of bar association committee. The plan involves two types of bar committees, one to recruit prospects for the governor to nominate and another to screen and rate his choices before appointments are formalized.

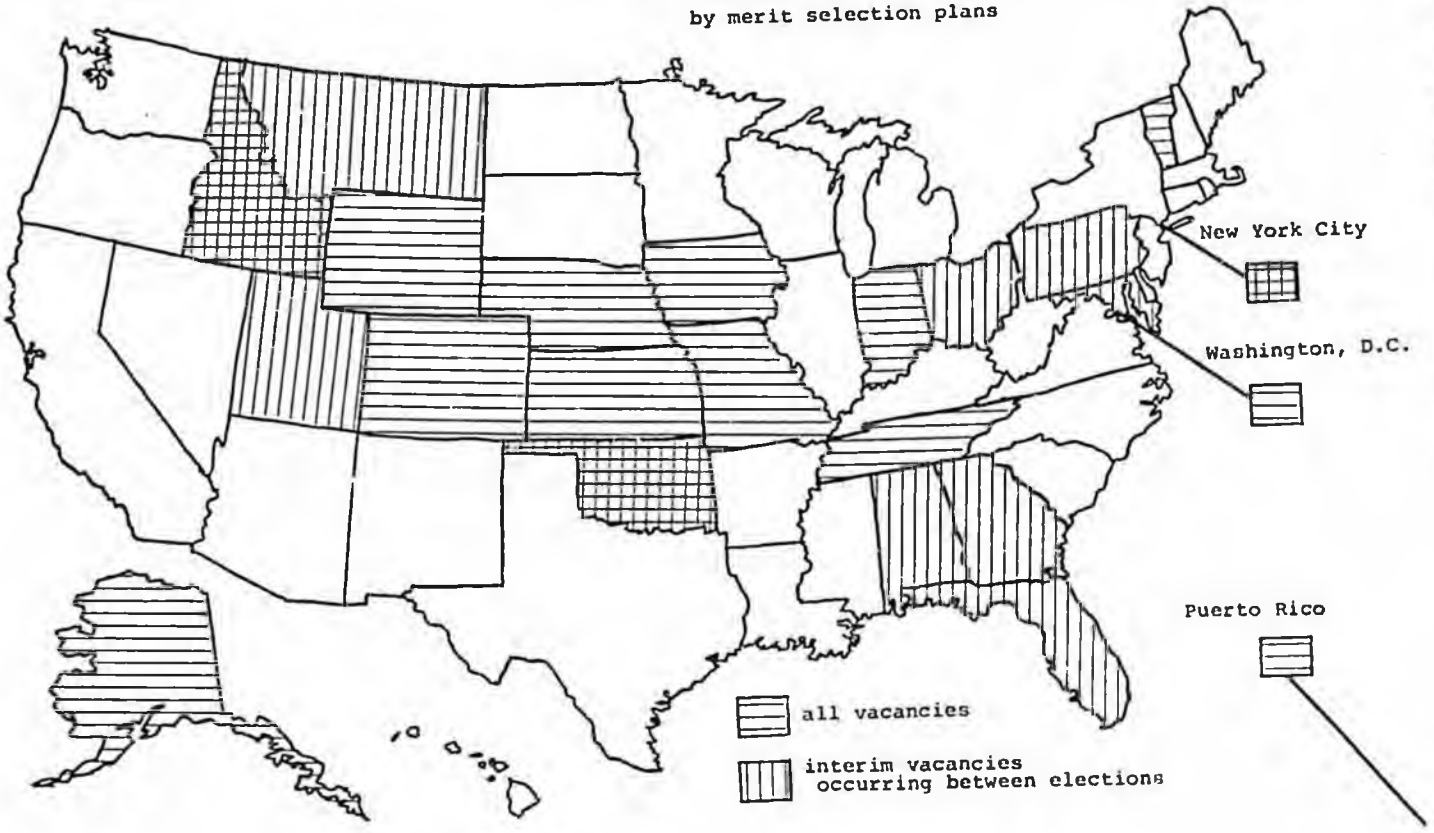
In *Delaware,* former Governor Russell T. Peterson initiated a voluntary plan for the appointment of judges only after seeking the advice of the state bar association. The plan has been continued by Governor Sherman W. Tribbitt.

Governor Ronald Reagan of *California* has voluntarily filled all judicial vacancies on the trial courts of his state with the help of commissions he established by executive action in 1967. In each of the fifty counties a commission composed of lawyer and non-lawyer members rates judicial candidates. Similarly, the State Bar Board of Governors Commission also evaluates prospective nominees. However, the county commissions have not been included as nominating commissions that satisfy the framework of a nonpartisan merit selection plan. Before a judicial candidate's name is submitted to the commission, he must apply to the governor's office for consideration. While the initial screening of candidates at the governor's office is minimal, the commission is placed in a position of approving or disapproving the governor's choices rather than initially and independently generating, screening and submitting candidates to the governor.

The methods of state judicial selection have varied considerably over the past two centuries. Variety continues to be a basic element in the nonpartisan merit selection plan. No two state or municipal plans are identical in all relevant respects. The profound impact that these commissions have on the selection of state judges serves as the basis for this study. Having provided an historical backdrop for these nominating commissions, we will proceed to analyze and evaluate them in much greater detail.



2. VACANCIES COVERED
by merit selection plans



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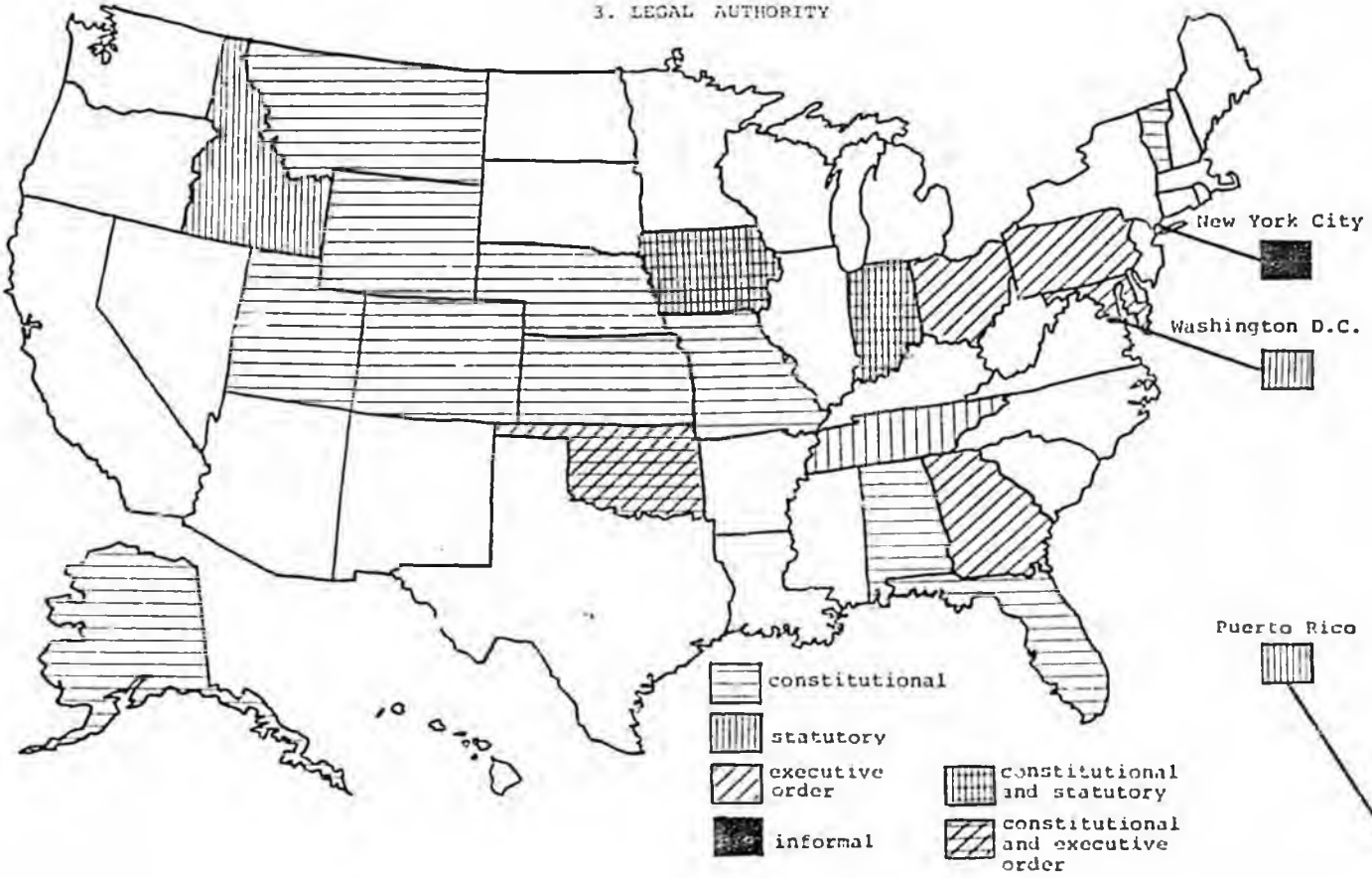

Chapter 2

Judicial Nominating Commissions

Introduction

The judicial nominating commission is the cornerstone of the merit selection plan. Because the nominating commission has ultimate authority to determine which candidates are qualified to hold judicial office, the effectiveness of the merit plan is dependent upon the successful functioning of this body. Accordingly, this chapter is devoted to an analysis of the workings of presently established commissions in an effort to discover how such factors as the commission's composition, workload, and operating procedures affect the selection process. An aid in this analysis the reader should refer to Table I (appearing at pp. 27-37, which outlines the composition and operation of the nominating commissions in each merit selection jurisdiction.

Our questionnaire survey of judicial nominating commissioners was designed to be a nation-wide reference point for our discussion of the issues surrounding the operation of the

commission. The questionnaire was developed and pretested in Nebraska and at a Florida Judicial Nominating Commissioners Institute in the spring of 1973. Thereafter, a questionnaire[1] was mailed to every current member of all those commissions (except Nebraska's) which we felt had enough of an operating history to be able to give informed responses. Thus, we did not question commissioners in Georgia, Indiana, Ohio, Pennsylvania, Montana, or the District of Columbia because they lacked sufficient experience as of June, 1973, the date of our mailing. We mailed 797 questionnaires to commission members in thirteen states, one city (New York City), and one county (Jefferson County, Alabama), all of which had had some form of merit selection in operation for longer than one year at the time of the mailing. For comparison purposes we also sent 85 questionnaires to "bar screening" commission members in five states whose operations are superficially similar to judicial nominating commissions.[2] From the merit selection states we received usable responses from 371 current commissioners, a response rate of 46.5%. It should be noted however that although we did succeed in obtaining a wide geographical range, the four states with the most numerous commissions and commissioners (Florida, Colorado, Iowa, and Maryland) accounted for 77.6% of the replies.

The questionnaire attempted to elicit information in three basic areas: 1) The nominating commissioners themselves; 2) The personal qualities and qualifications that commissioners regard as most important in selecting judges; and 3) The actual operations and procedures of the commissions. With the aid of a computer we also were able to determine whether significant variation occurred when commissioners were compared on the basis of age, experience, political party, occupation, and bar affiliation. Similarly, we were able to isolate certain key operational differences among the various commissions such as mode of recruiting, interviewing, and confidentiality. Finally, we encouraged each commissioner to give his impressions as to the success of his commission as well as his suggestions for improvement, if any.

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1. See Appendix 2-A.

2. Upon analyzing the responses contained in the 34 questionnaires completed and returned by "bar screeners", we found no significant differences between their evaluation of the qualities and qualifications which should be exhibited by a potential appointee and the evaluation of the commissioners in merit plan jurisdictions.

Commission Composition

Historical Development

As with other aspects of the merit selection plan, thinking regarding the question as to who should sit on the nominating commission has changed over the years. The nominating body contained in the plan conceived by Professor Kales in 1914 consisted of a judicial council, composed solely of high ranking members of the judiciary. During the 1920's, the advisability of including members of the bar in the nominating process was propounded by such men as Harold J. Laski and Herbert Lincoln Harley. Finally, at the 1931 annual meeting of the American Judicature Society, Walker B. Spencer set forth a proposal concerning the composition of the nominating body which has since met with widespread favor. Spencer proposed that candidates be nominated by a commission composed not only of judges and lawyers but non-lawyers as well.[3] In adopting a resolution in favor of a merit plan for judicial selection in 1937, the House of Delegates of the ABA appears to have given consideration to the approaches taken by both Kales and Walker in proposing that the nominating body be "composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office."[4]

When Missouri became the first state to adopt a merit plan in 1940, it included on each of its nominating commissions a member of the judiciary and an equal number of lawyer and non-lawyer members. Since then, the majority of the jurisdictions adopting a merit plan have followed Missouri's lead in including judicial, lawyer, and non-lawyer members on the commission.[5] In addition, the Model Judicial Article approved by the American Bar Association's House of Delegates in 1962 also contains a merit plan for judicial selection which utilizes nominating commissions composed of judicial, lawyer, and non-lawyer members.

In most jurisdictions which have adopted a merit plan, the judicial member of the nominating commission acts as chairman and, in certain of these jurisdictions, sits as a non-voting

3. For an excellent discussion of this historical development, See Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQUESNE L.REV. 61 (1968).

4. 62 A.B.A. Rep. 893 (1937).

5. See Table I, this chapter.

member. The lawyer members of the commission are usually either elected at large by members of the bar residing in the geographic area in question or appointed by the governing body of the organized bar. The non-lawyer members of the commission are usually appointed directly by the governor.[6] Although there is little argument over the desirability of including non-lawyers, since their inclusion "assures that public expectations concerning the judiciary are influential and the non-professional attributes of a good judge are recognized",[7] the general practice of having the governor appoint these lay members has been criticized as an invitation for political machinations. Since merit selection is intended to deprive the executive of the opportunity to make judicial appointments solely on the basis of his political motivations (and to remove the political pressures on him to do so), it is thought to be self-defeating to permit the executive to have a direct say in the appointment of the nominating commissioners.[8]

To remedy this problem it has been suggested that the lay members of the commission be selected by a bi-partisan legislative committee.[9] Of course, the details of such a solution may perhaps embroil the legislature in its own partisanship, because bi-partisan rarely means nonpartisan. At any rate, there is much concern expressed by the commentators that the lay members are either particularly susceptible to undue influence or all are mere ciphers who meekly defer to the political demands of the executive, the authoritative tone of the judicial member, or the glibness and legal expertise of the lawyer members. The open-ended responses to our questionnaires reveal that very few lay members felt dominated by the lawyers and that equally few lawyer members felt the lay members to be superfluous. Our responses did indicate differences in perceptions between lawyer and laymen, and there were some suggestions that perhaps the lawyers do hold the balance of power, especially in recruiting. However, we have found little reason to doubt the need for lawyer-laymen interaction on the judicial nominating commission. An evaluation of the recent ad hoc Massachusetts judicial selection committee supports this conclusion:

6. *Id.*

7. ABA Commission on Standards of Judicial Administration, *Standards Relating to Court Organization* 40 (Tentative Draft, 1973).

8. Note, *Analysis of Methods of Judicial Selection and Tenure*, 6 SUFFOLK L. REV. 955, 968 (1972).

9. *Id.*

The interaction between lawyers and laymen on the Committee is of some interest. Except in one or two cases, most of the laymen have scant knowledge of the courts, the judiciary, or their recent problems. The laymen, however, soon realized that they were as perceptive as the lawyers about people, and equally adept in evaluating available information. While laymen had to defer to lawyer opinions about legal experience, they had strong, independent views and were by no means dominated or manipulated by the lawyers.

Lawyer perceptions of the lay members confirm the capacity and desirability of lay participation. Most felt that lay people provided a more detached view of the system, bringing a consumer citizen perspective to bear, and counteracting the "chumminess" that tends to exist among lawyers.[10]

In addition to the lawyers and laymen, many commissions provide for a judicial member as well. As indicated in Watson and Downing's seminal study of judicial selection in Missouri, this judge often has been a dominating force.[11] Indeed, this may still be a problem in that state since one Missouri commissioner complained that there was "a tendency for the Supreme Court member to stifle the arguments for or against a particular candidate. Most attorneys on the commission have been trial attorneys, and the awe, respect or dominance of judges tends to become built in." On the other hand we received generally favorable comment about the role of the judicial members in Colorado.

Aside from the judicial member, who usually serves ex-officio, most merit plan jurisdictions provide for six-year, staggered terms for commission members. All merit plans require that the lawyer and non-lawyer members be residents of the geographic area covered by the judicial offices to be filled by the commission. Although few plans contain explicit provisions which attempt to insure that the two major political parties will be given relatively equal representation on the commission,[12] most plans explicitly require that the appointing official or appointing body not give consideration to political affiliation in appointing members of the commission. In addition to these restrictions concerning political affiliation, many plans pro-

10. Robertson and Gordon, *Merit Screening of Judges in Massachusetts: The Experience of the Ad Hoc Committee*, 58 MASS. L.Q. 131, 138 (1973).

11. Watson and Downing, THE POLITICS OF THE BENCH AND BAR (New York; John Wiley and Sons, Inc., 1969).

12. See Table IX, Chapter 3.

hibit the appointment of a public office holder to the commission and some prohibit the appointment of persons holding office in a political party.[13] Finally, some plans prohibit commission members from serving for two consecutive terms and explicitly preclude a commission member's eligibility for judicial office while he sits on the commission and for a period of one or more years thereafter.[14]

13. See Table X, Chapter 3.

14. *Id.*

TABLE I
Judicial Nominating Commissions

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Alabama	*Constitutional* Governor appoints to interim vacancies only. Thereafter, appointee must run in partisan election at end of each term.	(2) *Jefferson County Judicial Commission* 10th Judicial Circuit Court *Madison County Judicial Commission* 23rd Judicial Circuit Court (6 year terms)	5 Members 1 judicial—elected by judges of appropriate judicial circuit. 2 lawyers—elected by lawyer residents of appropriate judicial circuit from list of nominees of the appropriate Bar Assn. 2 non-lawyers—elected by state senator and representatives from appropriate county. All serve 6 year terms.
Alaska	*Constitutional* Governor appoints. Thereafter, appointee must stand in retention election at end of each term	(1) *Judicial Council* Supreme Court (10 year term) Superior Courts (6 year term) District Courts (4 year term)	7 Members Chief Justice of Supreme Court (Chairman) 3 lawyers—appointed by governing body of state's unified bar 3 non-lawyers—appointed by governor, subject to legislative confirmation. All serve 6 year terms.

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Colorado	*Constitutional* Governor appoints. Appointee serves provisional term of 2 years; thereafter, must stand in retention election at end of each term.	(24) *Supreme Court Nominating Commission* Supreme Court (10 year term) Court of Appeals (8 year term)	12 Members Chief Justice of Supreme Court (Chairman). 5 lawyers (one from each congressional district)—elected by majority vote of governor, attorney general and chief justice. 5 non-lawyers (one from each congressional district)—appointed by governor. 1 non-lawyer—appointed by governor. All serve 6 year terms.
		Judicial District Nominating Commissions (22) District Courts (6 year term) Probate Courts (6 year term) Juvenile Courts (6 year term) Superior Court of Denver (6 year term) County Courts outside of Denver (4 year term)	8 Members Supreme Court Justice (Chairman). 3 lawyers*—elected by majority vote of governor, attorney general and chief justice. 4 non-lawyers (at least one from each county in the appropriate judicial district)—appointed by governor. All serve 6 year terms.
	Denver Home Rule Charter Mayor appoints for provisional term of 2 years. Thereafter, appointee must stand in retention election at end of each term.	*Denver County Court Judicial Nom. Commis.* Denver County Court (4 year term)	8 Members Denver County Court Presiding Judge. 3 lawyers—appointed by mayor. 4 non-lawyers—appointed by mayor. All serve 4 year terms.

*Colorado Judicial District Nominating Commissions—in judicial districts having a population of 35,000 or less, at least 4 members of the commission must be non-lawyers; the other members may be lawyers or non-lawyers, depending on majority vote of the governor, attorney general, and chief justice.

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
District of Columbia	*Statutory* President appoints with Senate confirmation. Automatic reappointment if Tenure Commission finds "exceptionally well qualified" or "well qualified" If TC finds "qualified", President has option to resubmit for Senate confirmation or not. If TC finds "unqualified", appointee ineligible for reappointment.	(1) *Judicial Nominating Commission* Court of Appeals (15 year term) *Superior Court* (15 year term)	7 Members Active or retired federal judge serving in the District—appointed by Chief Judge of the U.S. District Court for the District of Columbia 1 lawyer or non-lawyer—appointed by President of United States. 2 lawyers—appointed by Board of Governors of the D. C. United Bar. 2 members (one of whom may not be a lawyer)—appointed by mayor. 1 non-lawyer—appointed by the District Council All serve 6 year terms except member apptd. by President who serves a 5 year term.
Florida	*Constitutional* Governor appoints to interim vacancies only. Thereafter, appointee must run in non-partisan election at end of term.	(25) *Supreme Court Nominating Commission* Supreme Court (6 year term) *District Courts of Appeal Nominating Commissions* (4) Courts of Appeal (6 year term) *Judicial Circuit Nominating Commissions* (20) Judicial Circuit Courts (6 year term)	Each Commission has 9 Members 3 lawyers—appointed by Board of Governors of Florida Bar. 3 electors—appointed by governor. 3 non-lawyers—elected by majority vote of other commissioners. All serve 4 year terms.
Georgia	*Executive Order* Governor appoints to interim vacancies. Thereafter, appointee must run in next general election.	(2) *Judicial Nominating Commission* Supreme Court Court of Appeals Superior Courts	10 Members 5 lawyers—serve by virtue of office in the State Bar of Georgia 5 non-lawyers—apptd. by governor. Non-lawyers serve for terms concurrent with the governor's term.

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Georgia (continued)	*Atlanta City Charter* Mayor appoints. Thereafter, appointee must stand in retention election at end of each term.	*Judicial Commission* Municipal Court of City of Atlanta (4 year term)	8 Members 3 lawyers—appointed by Atlanta City Bar Association 3 lawyers—appointed by Gate City Bar Assn. 2 non-lawyers—apptd by mayor. All pointed by governor with consent of Senate All serve 6 year terms.
Idaho	[illegible]	[illegible]	[illegible]
	Statutory District Magistrate's Commission appointed for terms of 2 years [illegible] of each term	*District Magistrates Commissions* (7) Magistrates of District Courts (2 year terms)	5+ Members 2 lawyers—nominated by local bar [illegible] [illegible] each district 3 non-lawyers [illegible] each county of [illegible] district)—appointed by governor All serve 6 year terms.

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Indiana (continued)	*Statutory* Governor appoints certain County Superior Court judges for initial term of 2 years. Thereafter, appointee must stand in retention election at end of each term.	*Lake County Superior Court Nominating Commission* Lake County Superior Court *Allen County Superior Court Commission* Allen County Superior Court *Vanderburgh County Superior Court Nominating Commission* Vanderburgh County Superior Court (6 year terms)	7 Members 1 judicial (Chairman)—appointed by Chief Justice of Supreme Crt. 3 lawyers—elected by lawyer residents of appropriate county. 3 non-lawyers—appointed by governor. All serve 4 year terms.
	Statutory Governor appoints to initial term, and makes subsequent re-appointments at [illegible] of each term	*Marion County Municipal Court Nominating Commission* Marion County Municipal Court (4 year term)	9 Members 1 judicial—appointed by Chief Judge of Court of Appeals 2 lawyers—elected by local bar association 2 non-lawyers—appointed by mayor. 2 non-lawyers—appointed by governor. 1 lawyer—appointed by Marion County Superior Court en banc. 1 Circuit Judge (Secretary) All serve 2 year terms.
	[illegible]	(113) *State Judicial Nominating Commission* Supreme Court (8 year term)	12 Members 6 electors (one from each congressional district)—appointed by governor with Senate confirmation 6 electors (one from each congressional district)—elected by bar members of appropriate district. All serve 6 year terms.

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Iowa (continued)		*District Judicial Nominating Commissions* (13) District Courts (6 year term)	11 Members 1 District Judge—appointed by Chief Judge of district. 5 electors—appointed by governor. 5 electors—elected by bar members of appropriate district. All serve 6 year terms.
	Statutory Commission appoints.	*County Judicial Magistrate Appointing Commissions* (99) Judicial Magistrates (4 year term for full-time; 2 year term for part-time)	6 Members 1 judicial—appointed by Chief Judge of District. 2 lawyers—elected by appropriate county bar. 3 non-lawyers—appointed by appropriate County Board of Supervisors. All serve 6 year terms.
Kansas	*Constitutional* Governor appoints. Thereafter, appointee must [illegible]	(1) *Supreme Court Nominating Commission* Supreme Court (6 year term)	11 Members 1 lawyer-at-large Chairman—elected by Kansas lawyers. 5 lawyers, one from each [illegible] [illegible] 5 lay members.
Maryland	*Executive Order* Governor appoints to interim vacancies only.	(9) *Governor's Commission on Appellate Judicial Selection* Court of Appeals Court of Special Appeals	13 Members 1 Chairman—appointed by governor. 6 lawyers—elected by bar. 6 non-lawyers—apptd by governor. All serve 4 year terms.

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Maryland (continued)		*Governor's Commissions on Trial Court Judicial Selection* (8) Circuit Courts Supreme Bench of Baltimore Municipal Bench of Baltimore People's Courts of Prince George and Wicomico Counties	11 Members 1 Chairman—apptd. by governor. 5 lawyers—elected by bar. 5 non-lawyers—apptd by governor. All serve 4 year terms.
Missouri	*Constitutional* Governor appoints. Thereafter, appointee must stand in retention election at end of each term.	(6) *Appellate Judicial Commission* Supreme Court (12 year term) Court of Appeals (12 year term)	7 Members 5 Supreme Court Justice—elected by members of Supreme Court. 3 lawyers (one from each court of appeals district)—elected by lawyer residents of appropriate district. 3 non-lawyers (one from each court of appeals district)—appointed by governor. All serve 6 year terms.
		Judicial Circuit Commissions (4) Circuit and Probate Courts within St. Louis, Clay, Platt and Jackson Counties (12 year terms) St. Louis Courts of Criminal Correction (12 year term)	5 Members Chief Judge of District Court of Appeals. 2 lawyers—elected by lawyer residents of appropriate circuit. 2 non-lawyers (one from each circuit)—apptd. by governor. All serve 6 year terms.
	Charter of Kansas City City Council appoints. Thereafter, appointee must stand in retention election at end of each term.	*Municipal Judicial Nominating Commission* Municipal Court of Kansas City (4 year term)	5 Members Presiding Judge of Circuit Court of Jackson County (Chairman) 2 lawyers—elected by lawyer residents of Kansas City. 2 non-lawyers—apptd. by mayor. All serve 4 year terms.

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Montana	*Constitutional* Governor appoints (with Senate Confirmation) to interim vacancy only. Thereafter, appointee must run in non-partisan election at next general election.	(1) *Judicial Nomination Commission* Supreme Court District Courts	7 Members District Judge—elected by district judges and certified by Supreme Court. 2 lawyers (one from each congressional district)—appointed by Supreme Court. 4 non-lawyers—apptd. by governor. All serve 4 year terms.
Nebraska	*Constitutional* Governor appoints. Thereafter, appointee must stand in retention election at end of each term.	(51) *Supreme Court Nominating Commissions* (7) Supreme Court (6 year term) *District Court Nominating Commissions* (21) District Courts (6 year term) *County Court Nominating Commissions*** (21) County Courts (6 year term) *Juvenile Judge Nominating Commission* Juvenile Courts (6 year term) *Workman's Compensation Court Nominating Commission* Workman's Compensation Court	Each Commission has 9 Members Supreme Court Justice (Chairman)—apptd. by governor. 4 lawyers—elected by lawyer residents of appropriate district. 4 non-lawyers—apptd. by governor. All serve 6 year terms.

***Nebraska County Court Nominating Commissions—in practice, the members serving on these Commissions often serve also on the corresponding District Court Nominating Commissions.

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
New York City	*Voluntary* Mayor appoints.	(1) *Mayor's Committee on the Judiciary* Criminal Court (10 year term) Family Court (10 year term) Civil Court (interim vacancies only)	24 Members 13 lawyers or non-lawyers—each Presiding Justice of New York City's two Appellate Divisions selects 6 members; one member is selected jointly. 11 lawyers or non-lawyers—appointed by mayor. Serve terms concurrent with the mayor's term.
Ohio	*Executive Order* Governor appoints to interim vacancies only. Thereafter, appointee must run in non-partisan election at end of term.	(12) *Supreme Court Nominating Council* Supreme Court (6 year term) *District Judicial Nominating Councils* (11) Court of Appeals and Trial Courts within Appellate District (6 year terms)	11 Members 5 lawyers—appointed by governor. 5 non-lawyers—apptd. by governor. 1 lawyer or non-lawyer—appointed by governor. All serve 4 year terms. 10 Members 5 lawyers—appointed by governor. 5 non-lawyers—apptd. by governor. All serve 4 year terms.
Oklahoma	*Constitutional* Governor and Chief Justice of Supreme Court appoint. Thereafter appointee must stand in retention election at end of each term. (Appellate Cts.) *Executive Order* Gov. appts. to interim vacancies (trial cts.).	(1) *Judicial Nominating Comission* All judicial offices within the state.	13 Members 6 lawyers (one from each congressional district)—elected by lawyer residents of appropriate district. 6 non-lawyers (one from each congressional district)—appointed by governor. 1 non-lawyer—elected by other commissioners. All serve 6 year terms except member-at-large who serves 2 year term.

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Pennsylvania	*Executive Order* Governor appoints to interim vacancies only. Thereafter, appointee must run in partisan election in next odd-numbered year.	(2) *Appellate Court Nominating Commission* Supreme Court Superior Court Commonwealth Court	7 Members 3 lawyers—appointed by governor. 3 non-lawyers—apptd. by governor. Supreme Court Justice who is ineligible for retention—appointed by governor. All serve 4 year terms.
		Trial Court Nominating Commission Courts of Common Pleas Community Courts Philadelphia Municipal Court Traffic Court of Philadelphia	5 Members-at-Large+ 2 lawyers—appointed by governor 2 non-lawyers—apptd. by governor. 1 lawyer or non-lawyer—appointed by governor. + 2 lawyers from each judicial district with 30+ judges (serve only for appointments within that district—districts with less than 30 judges have 1 lawyer member)—appointed by governor. All serve 4 year terms.
Tennessee	*Statutory* Governor appoints. Thereafter, appointee must stand in retention election at end of each term.	(1) *Appellate Court Nominating Commission* Court of Appeals Court of Criminal Appeals (8 year terms)	6 Members 3 members (one resident from each grand division of state—only one can be lawyer)—apptd. by governor. 3 lawyers (one from each grand division of state)—elected by members of Tennessee bar. All serve 6 year terms.

State	Type of Plan	Commission(s) and Judicial Offices Encompassed	Selection and Tenure of Commissioners
Utah	*Statutory* Governor appoints. Thereafter, appointee must run in non-partisan election at next general election.	(8) *Supreme Court Nominating Commission* Supreme Court *District Court Nominating Commissions* (7) District Courts	7 Members Chief Justice of Supreme Court (Chairman) 2 lawyers—selected by Utah State Bar Assn 2 non-lawyers—apptd. by governor. 1 lawyer or non-lawyer—selected by State Senate. 1 lawyer or non-lawyer—selected by State House of Representatives. All serve 4 year terms.
Vermont	*Constitutional* Governor appoints, subject to confirmation by the Senate.	(1) *Judicial Selection Board* Supreme Court (2 year term) Superior Court (6 year term) District Court (4 year term)	11 Members 3 lawyers—elected by lawyer residents of the state. 2 non-lawyers—apptd by governor 3 state senators (only one may be a lawyer)—elected by State Senate. 3 state representatives (only one may be a lawyer)—elected by State House of Representatives. All serve 2 year terms.
Wyoming	*Constitutional* Governor appoints. Thereafter, appointee must stand in retention election at end of each term.	(1) *Judicial Nominating Commission* Supreme Court (8 year term) District Courts (6 year term)	7 Members Supreme Court Justice (Chairman)—selected by Chief Justice of Supreme Court. 3 lawyers—elected by members of Wyoming bar. 3 non-lawyers—apptd. by governor. All serve 4 year terms.

Biographical Information

The 371 commissioners who responded to our questionnaire were overwhelmingly white (97.8%) and male (89.6%). Only six replies were received from black commissioners (one commissioner listed his race as "mixed" and one was a Chicano). Of course it is well known that the percentages of black lawyers and judges in this country are correspondingly low. A recent statistical profile of the black judge in America concluded:

> There are still alarmingly few black lawyers in the country, although the number is rising. Recent statistics indicate that only about 4000 of the nation's 325,000 attorneys are black. Black attorneys constitute slightly more than one percent of the total number of attorneys even though blacks represent approximately twelve percent of the American population. With these statistics in mind it comes as no great surprise that there are few black judges. At the time of our survey [1972] there were 475 federal judges, of whom 31, or almost seven percent, were black. Of 21, 294 full and part time state and city judges, only 255 were black, or slightly more than one percent.[15]

Clearly the number of black judges in this country is too low, and improvement in this area is largely dependent upon an increase in the number of qualified black attorneys (a need which must be met by the law schools). However, there is no reason why the judicial nominating commission should remain so unrepresentative in this respect. Perhaps the paucity of non-white lawyers explains the fact that only two of 194 lawyers (including 16 judges) on the commissions were non-white. But that does not explain why only five of the 153 lay members (3.3%) were non-white. Part of the reason for including lay members on the commission is to insure a more representative cross-section of the community. Perhaps the recent conversion of some of the more urbanized states to merit selection such as Pennsylvania, Ohio, Indiana, and the District of Columbia will bring a concomitant rise in minority group representation on the judicial nominating commissions; however, our study indicates that, at least in those states surveyed, the goal of a representative cross-section of the community in terms of racial make-up is not being fulfilled.[16]

15. *The Black Judge in America: A Statistical Profile*, 57 JUDICATURE 18 (1973).

16. Although our questionnaire results gave no indication of this, the Executive Director of the Florida Bar has informed us that there is at least one black member on each of the 25 nine-member Judicial Nominating Commissions in Florida. Letter from Marshall Cassedy to Allan Ashman, April 2, 1974.

The percentage of women members was also surprisingly low—10.4%. However, this figure obscures the even more dramatic finding—that only one of the 194 lawyers responding to our questionnaire was a woman. As is the case with black lawyers, women make up a very small percentage of the profession—only 2.8% of all lawyers are women.[17] Of the lay members, 22.3% were women.

The political affiliation of our responding commissioners is more evenly divided although the percentage of Republican members is higher than the national average:

Democrats—47.9% Republicans—45.1% Independents—6.6%

A commissioner was more likely to be 54 years old or older (42.3%) than 47 years old or younger (35.0%):

35 or younger	— 6.8%	54-59	—19.5%
36-41	— 8.5%	60-65	—13.2%
42-47	—19.7%	66 or older	— 9.4%
48-53	—22.7%		

Almost half (49.6%) of our respondents were lawyers, with an additional 4.7% judges. This result is in harmony with the general half lawyer—half lay make-up of the commission which prevails in most of the merit selection jurisdictions.[18] Among the lay members, bankers and business executives predominated (27.1% of the laymen), along with a sprinkling of educators (7.8%), journalists (4.8%) and medical professionals (3.6%). The rest (56.6%) fall into other occupations: ranchers, salesmen, housewives, etc. As far as we could determine, only one student (a Florida college student) has been appointed to serve as a lay member of a commission.

Thus, as a preliminary observation, it is apparent that the commissioners are predominately lawyers and businessmen. This is not to say that the commissions' *work* is necessarily dominated by these two groups, but it does leave the nominating commission as an institution open to charges of elitism. As Watson and Downing pointed out in their analysis of the St. Louis lay commissioners, the over-representation of businessmen and bankers tends to undercut the rationale for having lay commissioners.

> [T]he largest number of lay nominating commissioners have been spokesmen for the value of the business community. Drawn entirely

17. THE 1971 LAWYER STATISTICAL REPORT, American Bar Foundation (1972).

18. See Table 1 at pp. 27-37.

from banking, commerce, and industrial firms, they have generally shared the values of the corporate lawyers serving on the nominating commission, and have usually deferred to the lawyer commissioners and the presiding judge for assessment of the legal abilities of judicial candidates. In addition, these lay commissioners occasionally have turned for advice to the legal counsel employed by their own business firms.[19]

Thus, there is some doubt that this type of lay member really does represent the broad public interest or that he really is better able to ensure that the non-professional attributes of prospective judges are recognized.

The question of representation is, then, a valid one; but it must be remembered that a judicial nominating commission is not meant to be a democratic institution. Indeed, it is meant to be a refinement of the democratic process—adding the informal expert opinion of the commission to the political considerations which inevitably (and arguably should) affect the elected executive who must make the final choice. On the other hand, if the commissions as presently constituted are unrepresentative, there is a danger that this might operate as a substitute for, or at the expense of, legitimate expertise. If this be true the commission may not begin its task objectively, and certain biases will naturally creep into its procedures and its evaluation of potential judges. This issue may be better explored after a look at commission operating procedures.

Commission Operating Procedures

Before evaluating the nominating process, some consideration must be given to the characteristics which should be exhibited by a good selection process. In a paper presented at the National Conference on the Judiciary in 1971, Judge Laurance M. Hyde, Jr., then Dean of the National College of State Trial Judges, catalogued his conception of the attributes of a good judicial selection process. It should, he stated:

1) systematically and aggressively seek the best potential judicial talent;

2) identify and reject aspirants who are not qualified for the bench;

3) operate with sufficient dignity so as not to cause capable lawyers to refuse to be candidates for judicial office;

4) provide tenure of such a nature as to encourage each

19. Watson and Downing, *supra* note 11 at 136-137.

judge to do the best job of judging of which he is capable and to encourage good lawyers to give up their practices for the bench; and

5) deserve and receive public respect and trust.[20]

Although others may have approached this topic from a different perspective, Judge Hyde's concise list is sufficiently comprehensive to reflect the thinking of most serious commentators on this subject. Since Judge Hyde also is an outspoken proponent of merit selection, his list tends to reflect the expectations of most commentators not only as to the attributes of a good judicial selection process generally but also the attributes of the merit selection process in particular.

If the selection process itself is expected to "systematically and aggressively seek the best potential judicial talent" and "identify and reject aspirants who are not qualified for the bench", the process must include a dynamic component which actively and effectively recruits and screens potential judicial talent. Under the nonpartisan merit selection plan, this role is ascribed to the nominating commission. Thus, if Judge Hyde's comments were extended to the nominating process, it would appear that the nominating commission is expected to play a dynamic role in recruiting and screening candidates, while operating "with sufficient dignity so as not to cause capable lawyers to refuse to be candidates for judicial office" and in a manner which will insure that the selection process will "deserve and receive public respect and trust".

In light of these considerations, it is clear that the operating procedures of the nominating commission are of critical importance in assessing the effectiveness of a merit selection plan. If the commission conducts its business in a careless, disorganized fashion it is almost certain that the plan will not exhibit the attributes of a good judicial selection process. The remaining portions of this chapter analyze the operating procedures of the various nominating commissions. To facilitate such an analysis, commission procedures have been related to each of the essential aspects of the nominating process.

Commission Rule-Making

Unlike the detailed attention which is paid to the composition of the nominating commission, the provisions of the state

20. Hyde, *Good Judges are Made* * * *, JUSTICE IN THE STATES, ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY (West, 1971).

constitutions, legislative enactments, and executive orders which establish merit selection plans generally give scant attention to the operations of the nominating commission. Most plans simply require that the nominating commission, by concurrence of a majority of its members, assemble a list containing the names of a minimum number of nominees (usually three) and forward the list to the appointing official within a specified period of time. Where restraints are imposed, they normally are couched in terms so broad or vague as to offer little practical guidance. For example, the Maryland commission is required simply to "seek, receive, and review recommendations and information concerning the qualifications of proposed nominees for appellate judicial office".[21]

Because most merit selection plans do not contain provisions which dictate the procedures to be followed by the nominating commissions, the commissions generally have broad discretion in their recruiting, screening, evaluating, and nominating procedures. In fact, most plans explicitly grant to the nominating commission full authority to adopt any and all rules of procedure which it deems appropriate.

It appears, however, that most of the commissions either have not exercised their authority to adopt procedural rules or, if they have adopted rules, have neglected to commit them to written form. Sixty percent of the commissioners who responded to our questionnaire indicated that the operating procedures of their commission were not written or codified in any manner. This fact has provoked considerable self-criticism among commission members. Many respondents felt that the most important suggestion they could offer for improving the nominating process was the adoption of written procedural rules. An Iowa commissioner remarked, ". . . the meetings [of the commission] tend to be lengthy since we must establish our rules and procedures (such as how do we vote, what role should the presiding judge play) as we go along. At our last session we concluded that we must meet as a group and establish some ground rules."

In addition to provoking a certain amount of self-criticism, this situation apparently has engendered considerable confusion among commission members. The responses to our questionnaire indicated that, in at least seven jurisdictions, members of the same commission disagreed as to whether their

21. *Executive Order Creating the Governor's Commission on Appellate Judicial Selection*, p. 117 (July 6, 1970).

commission had compiled written procedural rules. This confusion can be attributed to two factors. The first is that it appears that some of the newer members of certain commissions were not made aware of the fact that written rules of procedure had been promulgated prior to their tenure on the commission. For example, the Rules of the Jefferson County Judicial Commission in Alabama were adopted in 1954, yet many members of that commission apparently are unaware of the existence of these rules. The second factor which has contributed to this confusion is an apparent disagreement over what constitutes rules of procedure. Some commissions have prepared written policy statements or manuals for new commission members which contain guidelines as to the objective and subjective criteria which should be applied in evaluating the candidates for judicial office. Although the existence of these general standards or policy statements in written form might tend to limit or control the discretion of the commission they clearly are more in the form of "interpretive" than "procedural" rules.[22]

However, a sizable minority of commissions have adopted "procedural" rules which limit or control the discretion of the commission. The Alaska Judicial Council and some of the commissions in Colorado, Florida, Iowa, Maryland, Nebraska, and Utah appear to adhere fairly closely to detailed procedural rules which they have adopted in written form. These rules establish quorum requirements, make provision for the calling of commission meetings, outline recruiting and screening procedures, and describe the balloting procedures.

Therefore, the commissions tend to fall into three broad categories insofar as they limit or control their own discretion with regard to the procedures which they employ. On one hand are those commissions which continue to exercise unfettered discretion with regard to the procedures they employ. At the other extreme are commissions which adhere to written procedural rules which they have adopted. In between are commissions which employ a mixture of published lists of standards and policy statements to control the discretion of individual commissioners.

The extent to which a commission "structures" its discretion,

22. For a discussion of the distinction between "interpretive" and "procedural" rules see Cooper, *Administrative Agencies and the Courts* (Ann Arbor: University of Michigan Law School, 1951).

by adhering to written procedural rules,[23] appears to affect the extent to which political considerations or other types of favoritism may enter into commission deliberations and may influence its decisions. Fourteen percent of the commissioners who responded that their commission had *not* adopted written procedural rules felt that political influences were introduced into their deliberations frequently, as opposed to only 8% of the commissioners who responded that their commission had adopted written procedural rules. Of greater importance is the effect which political considerations ultimately have upon the actual decisions of the commissions. Among those commissioners who indicated that their commission had not adopted written procedural rules, 24% believed that political considerations were of *some* importance in determining the eventual selection made by the commission and 6% felt that these considerations were of *decisive* importance. On the other hand, only 15% of the commissioners who indicated that their commission had adopted written procedural rules believed that political considerations were of *some* importance in determining the eventual selection made by the commission and only 2% felt that these considerations were of *decisive* importance.

These statistics may indicate more about the general influence of political considerations upon the decision-making process of the commission than they do about the effect of a more "structured" decision-making process on conscious or unconscious political bias. Accordingly, these influences are treated in greater detail in Chapter 3. However, for present purposes, these statistics do demonstrate certain tendencies which appear to be connected to the commission's exercise of its rule-making authority. Clearly, there is less of a tendency both for political considerations to be introduced into commission deliberations and for political influences to be of decisive importance in the eventual selection made by the commission if the commission adheres to written procedural rules.

This is true even though the procedural rules which presently control the decision-making process of certain commissions do not appear to be geared specifically toward excluding such influences from commission deliberations. None of the written rules adopted by these commissions explicitly bars discussion

23. See Davis, DISCRETIONARY JUSTICE (Baton Rouge: Louisiana State University Press, 1969) IV.

of a candidate's political affiliation during commission meetings nor do they contain language which would bar a commissioner from giving some effect to a candidate's political affiliation in reaching his ultimate decision. Certainly, even if such rules were adopted, it would be no more possible to insure the compliance of individual commissioners than it is to insure that a juror will comply with a judge's instruction to disregard prejudicial testimony. However, the formal imposition of such restraints should go far towards creating the proper climate within which these important decisions will be made. Such a climate must be created if the selection process is to exhibit the characteristics outlined by Judge Hyde.

As this study suggests, there are many areas in which the current operating procedures of the various nominating commissions can be improved. However, in order to give effect to any changes or improvements in the operating procedures of the various commissions it will be necessary for the commissions to give much more attention than they have in the past to adopting comprehensive rules of procedure to govern their actions. To be sure, the commissions must retain a certain amount of discretion. The nature of the nominating process is such as to require a good deal of flexibility. However, there appears to be a great need, at present, to "structure" this discretion by adopting procedural rules which describe the methods which will be used by the commission in carrying out its nominating function. The adoption of comprehensive sets of rules to "structure" the discretion of the commissions should lessen the likelihood that certain commissioners will be guided by vague standards and improper influences which have no place in a selection process based on merit.

Commission Meetings, Workload and Time Constraints

A major reason for the failure on the part of many of the commissions to adopt clear-cut procedures which will govern their actions is that many commissions meet infrequently. When they do meet they generally are required to give immediate attention to the business at hand—that of compiling a list of nominees for one or more judicial vacancies to be filled within a rather short period of time. In fact, none of the plans currently require the commissions to meet for any purpose other than to nominate candidates for particular vacancies which have recently occurred.

Since most commissioners are not compensated for the time they spend on commission business and most commissions are not provided with the services of a salaried staff, requiring the commissions to meet more frequently for the sole purpose of formulating or revising procedural rules may place too much of an additional burden on commission members. However, experience has clearly demonstrated that, in the absence of such requirements, the commissioners tend to give less than adequate attention to such matters.

A possible alternative approach to this problem has been taken by the plans in Nebraska and Wyoming. Rather than delegating rule-making authority to the commission, the authority to promulgate rules of procedure which will control the actions of the commission has been delegated to the state's highest court. Such an approach would be consistent with the tendency to repose in the highest court of the state the authority to adopt all rules which govern the operations of the state's court system. However, because this is a relatively recent development, there has not been enough experience to assess the consequences of this approach.

Because most nominating commission members are not compensated for the time they spend on commission business and most commissions are not provided with the services of a salaried staff, the size of commission workload often has a direct bearing upon the commission's ability to give thorough consideration to the qualifications of all potential candidates for a judicial vacancy. Although some commissions normally are required to nominate candidates for only one or two judicial vacancies each year, others consider candidates for as many as forty to fifty vacancies each year. In addition, while certain commissions must consider candidates for only a single judicial office, in certain states a single commission is required to screen and nominate candidates for *all* judicial offices (trial and appellate) within the state.

The Nebraska and Oklahoma plans represent the extremes in this regard. In Nebraska, there is a separate seven-member commission for each seat on the supreme court of the state and members of these commissions often serve out their six-year term without ever having screened a single candidate for judicial office. In Oklahoma, on the other hand, a single commission screens candidates for all judicial vacancies for the trial and appellate courts within the state. One Oklahoma commissioner estimated that during his tenure on the commission,

it has met approximately ten to twelve times per year, selecting nominees for from one to four judicial vacancies on each occasion.[24]

A heavy workload can have certain negative effects on the selection process. These negative effects generally relate to a commission's ability to recruit and screen potential candidates adequately and are discussed in later sections of this chapter. On the other hand, the positive effect to be derived from a commission's having a workload which is heavy but not unduly burdensome is that frequent exposure to the nominating process should aid in developing the commissioner's expertise in assessing the qualifications of candidates. This is particularly true for lay members of the commission.

Another factor which may have an adverse effect upon a commission's ability to function effectively is the time constraints which are imposed on the commission.

TABLE II
Time Constraints:
Occurrence of Vacancy to Submission of Names

Within 30 Days	*Within 45 Days*	*None*
Alaska	Utah	Alabama
Colorado		Georgia
District of Columbia	*Within 60 Days*	Idaho
Florida*	Kansas	Missouri
Montana	Maryland	Nebraska
Ohio	Wyoming	Oklahoma
Pennsylvania		Vermont
Tennessee	*Within 70 Days*	New York City**
	Indiana	

*Governor may extend time an additional 30 days.
**List of approved candidates is maintained and not limited to a precise formula based on specific vacancies (an approval expires 18 months after it is granted).

The Colorado plan is among the most restrictive, in requiring that the commission forward the names of the nominees to the governor *within thirty days of the creation of the vacancy.*

24. From a speech delivered by Jack R. Givens at the Pennsylvania Judicial Nominating Commissioners Institute on September 20, 1973

These strict time constraints make it particularly difficult for commissions to recruit and screen potential candidates adequately. This is true even if their operating procedures are fairly well-established. Justice Donald E. Kelley of the Colorado Supreme Court has stated:

> The few problems Colorado has emanate from the 30-day period between the creation of the vacancy and the certification by the Commission of the names of the nominees to the governor. Although this shortens the time that the court is unmanned, it does preclude time for a thorough investigation of the candidates.[25]

Commission Recruitment of Candidates

Upon the occurrence of a judicial vacancy, all merit plans contain explicit provisions to insure that adequate notice of the vacancy, and notice of procedures to be followed in submitting the names of applicants for the vacancy, is published in the newspapers and bar media covering the particular area in which the vacancy has occurred. In some jurisdictions, notice of the vacancy is mailed to every member of the bar qualified to fill the vacancy by reason of their residence alone. In addition, most commissions and individual commissioners are encouraged to actively recruit candidates for the vacancy.

Although workload and time factors often discourage certain commissions or individual commissioners from spending much time in active recruitment of potential candidates, certain plans have built-in devices to encourage such recruitment. When a judicial vacancy occurs in Nebraska, the clerk of the supreme court immediately contacts the chairman of the commission which has the responsibility for nominating candidates for the particular vacancy to ascertain from him the time and place for the first meeting of the commission. By statute,[26] this first meeting is required to be a *public* meeting and the clerk is required to inform each commission member and appropriate news media of the time and place for this meeting. The news media are informed that the commission will be interested in receiving at this meeting information relating to

25. From a speech delivered by Justice Kelley at the Maryland Judicial Nominating Commissioners Institute on May 24, 1973. It should be noted, however, that the Colorado plan allows the commission to begin receiving applications well before the occurrence of the vacancy if the vacancy can be anticipated.

26. NEB. REV. STAT. 24-810.

qualified candidates for the vacancy. In addition, the procedural guides furnished to the Nebraska nominating commissioners encourage individual commissioners to actively solicit qualified individuals to accept judicial office "even though these individuals or their friends do not see fit to suggest them as possible candidates at the public meeting".

The Nebraska commission is unusual in using the public hearing as a device to recruit applicants for judicial vacancies. In other jurisdictions, a heavy workload or certain time limitations may preclude the use of such formalized recruitment devices. For example, even though commission members in Oklahoma often attempt to encourage qualified individuals to apply for judicial office, the workload of the Oklahoma commission is so onerous that the use of such formal devices as the holding of public hearings is out of the question, and any solicitation of qualified candidates must necessarily be performed in an informal and uncoordinated fashion. This situation is aggravated when a vacancy occurs in an area of the state with which few, if any, members of the commission are familiar. Given such a situation, commission members must simply hope that publicity of the judicial vacancy will be sufficient to encourage an adequate number of qualified candidates to come forward.

Although most commissioners are encouraged to "beat the bushes" for qualified candidates, the stringent time limitations contained in many plans often make recruitment by commission members extremely difficult. Much of the thirty-day period allotted to many of the commissions is consumed in screening applicants who come forward of their own volition, making active recruitment of additional candidates extremely difficult.

Certainly, active recruitment poses certain problems. A commission member who personally solicits a certain individual whom he feels is well qualified runs the risk of having this individual assume that he ultimately will be nominated if he throws his hat in the ring. If the commission then fails to nominate this individual, both the commissioner and the candidate himself may be embarrassed. The plans in Kansas, Missouri and Wyoming have attempted to lessen the likelihood that such a situation will occur by allowing the commission to "tender nomination" to an individual before he has indicated his willingness to serve, if the commission believes that the individual is qualified but may not apply for judicial office unless he is given such prior assurance of nomination. In prac-

tice, however, this has seldom been done; and commission members have resorted to using personal encouragement without assurances of ultimate nomination or have tried to solicit the aid of influential members of the bench or bar in an effort to encourage the potential candidate to apply for the vacancy.

In their study of the nonpartisan court plan in Missouri, Watson and Downing pointed out the existence of a "recruitment politics", which was based on the assessment of both the recruiters and the recruited as to how the system operates or should operate. The authors found that "many and perhaps most lawyers feel that bar folkways dictate that you be asked to be a judge, rather than overtly seeking the position".[27] In conducting their study, Watson and Downing spoke to a number of lawyers who said that the reason they had never sought a judgeship was simply that no one had ever asked them.

If Watson and Downing's assessment of the "politics" of recruitment is correct, active recruitment of potential candidates must be viewed as an important function of the commission. In this regard, the first of Judge Hyde's attributes of a good selection process ("[i]t should systematically and aggressively seek the best potential judicial talent") is of particular relevance. Merit plans which create an environment which discourages such active recruitment by the commission—by virtue of imposing an onerous workload, strict time constraints, or other limiting factors—clearly fall short of the desired objective.

Commission Screening

The second of Judge Hyde's attributes of a good judicial selection process ("[i]t should identify and reject aspirants who are not qualified for the bench") is directly related to the manner in which the commission goes about screening candidates for a judicial vacancy. Because the screening procedures utilized by various commissions vary greatly, the use of the following devices will be dealt with separately in discussing commission operations:

1. candidate questionnaires;
2. commission investigations;
3. independent agency investigations;
4. preliminary deliberations to pare down the list of candidates;

27. Watson and Downing, *supra* note 11, at 65.

5. candidate interviews.

Candidate Questionnaires. Once a judicial vacancy has been publicly announced, the nominating commission usually will begin to receive correspondence from lawyers, judges, and interested citizens recommending certain individuals to the commission. In addition, the commission will receive direct correspondence from lawyers who wish to be considered for nomination. In most jurisdictions, the commission will then forward a "questionnaire" to all those individuals who have been brought to the attention of the commission. These questionnaires are of varying length and depth. For example, the one-page questionnaire utilized by the Kansas Supreme Court Nominating Commission contains only very general questions concerning the potential candidate's personal and professional history. On the other hand, the questionnaire used by the Pennsylvania Appellate Court Nominating Commission is nine pages long and, in addition to very particularized questions concerning the candidate's personal and professional history, contains an "open-ended" question which seeks to elicit the potential candidate's attitudes and opinions concerning the law and his qualifications for the bench.

In those jurisdictions which forward questionnaires to potential candidates who have not contacted the commission directly, and therefore have not indicated whether they will be available for judicial office, the candidate questionnaires used by the nominating commissions normally contain a question concerning the candidate's willingness to serve if nominated by the commission and appointed by the governor. Thus, aside from providing the commission with basic information concerning applicants, the questionnaire can play an important role in recruiting potential candidates. The commission's forwarding of the questionnaire to persons who have been recommended to it by others acts as an invitation by the commission. Thus qualified individuals who would not otherwise have applied for the judgeship become potential nominees.

In addition to general questions concerning the candidate's background, most of the candidate questionnaires ask the candidate to submit the names of individuals who are able to comment upon his qualifications for judicial office. The Pennsylvania questionnaire contains an interesting approach in this regard. The candidate in Pennsylvania is asked to submit the names of up to five judges before whom he has appeared most often during the previous five years and the names of the

adversary counsel against whom he has litigated his primary cases over the previous five years. The inclusion of such questions goes far toward decreasing the likelihood that the candidate has "padded" his questionnaire with overly favorable references.

Commission Investigations. The extent to which any of the commissions are able or willing to follow up on information supplied in the questionnaire, by contacting personal references or other individuals who should be familiar with the candidate, by virtue of their being connected with schools which the candidate has attended or with courts before which the candidate has practiced, will depend upon a number of factors. Such factors include the commission's workload and time constraints, the commission's preliminary assessment of the candidate's qualifications, and whether the commission has learned of something in the candidate's past which would render him automatically unfit to sit on the bench.

Although some of the commissioners are more thorough than others in this regard, 89% of the commissioners who responded to our questionnaire indicated that, beyond reviewing the personal and professional biographical data submitted to the commission, they make an additional personal effort to learn more about the candidate.

Independent Agency Investigations. Information which would result in a commission's decision that a particular candidate is unfit for judicial office usually is obtained as a result of an independent investigation of the candidate's background. Most commissions secure from each applicant a waiver of any privilege which the candidate has against receipt of credit, tax, criminal, medical, or psychiatric information. In most jurisdictions, such a waiver is contained in the questionnaire initially forwarded to the potential candidates.

Although many commissions limit such investigations to the securing of a credit report, others go much farther. For example, the chairman of the Oklahoma commission routinely requests that the Oklahoma Crime Bureau and the Oklahoma Tax Commission investigate each candidate. The Crime Bureau conducts field interviews with from three to five lawyers, laymen, or judges from the appropriate community. In addition, the Crime Bureau supplies the commission with any criminal report that may exist on the candidate. This report includes traffic offenses. The Tax Commission informs the commission as to whether the candidate has reported and paid his income taxes for a period of five years prior to the candidate's application. Evidently this investigation is considered necessary because a previous governor of Oklahoma had made an appointment from a list of nominees only to discover later that the appointee had not reported or paid his income taxes for several years.

Preliminary Deliberations. After reviewing the information supplied directly by the candidates, obtaining information concerning the candidates' qualifications from other individuals, and securing reports from one or more investigative agencies, many commissions may find it necessary to assemble to pare down the list of candidates prior to conducting candidate interviews and entering into more serious deliberations. Whether such a preliminary "pruning" is necessary depends upon a number of factors, including the number of candidates for a particular vacancy and whether the commission ultimately will conduct personal interviews with the candidates. Often the list of candidates for a particular vacancy is so long that the commission may find it impossible to interview each applicant. Even if the commission does not contemplate holding personal interviews with the candidates, the list of candidates may be so long and contain so many candidates who are not deemed suitable for consideration that such a paring down may be necessary before the commission enters into more serious deliberations.

Often this paring down process is conducted by a subgroup of the commission. In Missouri, for example, this initial pruning is sometimes accomplished informally by the lawyer and judicial members of the commission, with the lay commissioners deferring to their judgment.[28] In New York City, all candidates for Family or Criminal Court appointments must first be interviewed and approved by a sub-committee before they can be interviewed by the full committee.[29] On the other hand, certain commissions have deemed it necessary to call a general meeting of the commission and to proceed by having the entire commission cast ballots which rank those candidates whom the commissioners deem to be worthy of further consideration.

Candidate Interviews. Once all the information concerning each of the candidates warranting serious commission con-

28. See Watson and Downing, *supra* note 11, at 103.

29. "Procedures and Policies of the Mayor's Committee on the Judiciary" (as agreed to January 29, 1974).

sideration has been assembled, most commissions conduct a confidential interview with each candidate. Normally, each commissioner has received copies of all documents and correspondence received by the commission which are relevant to the applicant's candidacy prior to the scheduled date for the interview. Certain commissions have developed strict procedures for conducting such interviews. In Colorado, for example, the chairman begins the interview by questioning the candidate in an effort to clarify questions which may have been raised by the information which the candidate submitted directly to the commission. The chairman then proceeds to draw the candidate out on general matters concerning the candidate's legal philosophy. When the chairman has finished, each member of the commission, in order, questions the candidate as to specific matters deemed relevant to the applicant's candidacy.

In those jurisdictions which presently do not conduct personal interviews with the candidates, many commissioners, in responding to our questionnaire, indicated that they believed that the addition of personal interviews with the candidates was the most important suggestion they could offer for improving their commission's screening process. Generally, the non-lawyer members appeared to be more concerned than the lawyer members that this change be effected. They believed that adding candidate interviews to the screening process would put them on a par with the lawyer members of the commission in evaluating the individual candidate. One non-lawyer commission member in Iowa stated:

> The attorneys [on the commission] are usually well acquainted with the particular candidates while some of the other commission members may be less well associated. The opinion of the attorneys is usually relied on heavily for this reason. I think personal interviews might serve to give the whole commission a better perspective.

At present, it appears that none of the nominating commissions employ *all* of the basic screening devices—candidate questionnaires, commission investigation, independent agency investigation, preliminary deliberations to pare down the list of candidates, and candidate interviews—to their full extent. Most commissions find it necessary to rely on the use of certain of these devices to the exclusion of others. For example, although the Oklahoma commission appears to go the farthest in its use of independent investigative agency reports, it does not conduct personal interviews of candidates. This is not because the commission decided that personal interviews would not be worthwhile. Rather, it is attributable to the fact that

the commission is faced with a tremendous workload and is not provided with a salaried staff to aid in the handling of that workload. As one commission member stated:

> I would have to be a paid employee of the state of Oklahoma in order for us to consider conducting personal interviews of candidates.[30]

Clearly, the use of each of the aforementioned devices adds an extra dimension to the screening process. The proper use of each device enhances a commission's ability to "identify and reject aspirants who are not qualified for the bench". In addition, at no time during our study did individual commissioners indicate that the proper use of any of these devices was a waste of time or money. Therefore, in all merit plan jurisdictions, care should be taken to insure that the commission's business is organized in a manner which allows the commission to employ any or all of the screening devices so that it will select the best judicial talent available and eliminate from consideration those who are not qualified to hold judicial office.

Confidentiality

All nominating commissions attempt to keep all information received on a particular candidate during the screening process in strictest confidence. Although the public meeting requirements of certain plans may tend to subject certain information to public disclosure, even in these jurisdictions the commissions may receive applications after the public meeting, and they must keep all information received subsequent to the public meeting confidential. In addition, the actual deliberations of the commissions in all merit plan jurisdictions are confidential.

There appears to be little or no disagreement that at least this much confidentiality is absolutely necessary to insure that an adequate number of qualified individuals will apply for judicial positions without fear of having their reputations tarnished. The fear is that matters discussed during commission deliberations (most of which necessarily are based on hearsay) might become public knowledge. Maintaining confidentiality also increases the ability of commission members to evaluate the candidates as objectively as possible, without fear of subsequent embarrassment or intimidation.

Although there is general agreement that the information

30 Speech by Jack R. Givens at Nebraska Judicial Nominating Commissioners Institute on November 9, 1973.

received concerning applicants should be kept confidential, there is considerable disagreement over the advisability of keeping the *names* of individual applicants confidential. In this regard, the strictest confidentiality is maintained in jurisdictions such as Colorado, where only the name of the applicant who ultimately is appointed to the judicial office is divulged. The other extreme is typified by the merit plan in Jefferson County, Alabama, where the commission's rules explicitly require that the commission publicly announce the names of all those individuals who have been submitted to it for consideration for nomination. The Oklahoma plan is representative of the majority viewpoint as to this matter. In Oklahoma, only the names of the three nominees submitted to the governor are publicly disclosed.

TABLE III
Confidentiality Requirements

Names of All Applicants Made Known	*Names of Nominees Only Made Known*	*Name of Appointee Only Made Known*
Alabama	Florida	Colorado
Alaska	Idaho*	New York City
Missouri*	Indiana	Ohio
Tennessee	Iowa	Vermont
	Kansas	Wyoming
	Maryland	
	Montana**	
	Nebraska	
	Oklahoma	
	Pennsylvania	
	Utah	

*At discretion of judicial nominating commission (council)
**At discretion of the governor

The extent to which confidentiality should be maintained during the nominating process appears to be one of the most difficult questions facing the commissions. The reasons for insuring the confidentiality of certain information received during the nominating process are directly related to the goal

of creating a selection process which will "operate with sufficient dignity, so as not to cause capable lawyers to refuse to be candidates for judicial office." However, the public generally is suspicious of import governmental processes which appear to be cloaked in secrecy. Although it is unlikely that a commissioner will be pressured by individual citizens to disclose the names of applicants, or information concerning the applicants, or even the commissioner's evaluation of each applicant's chances for nomination, a commissioner often may be pressured by the news media or a representative of a special interest group to disclose such information.

The applicant who feels, for whatever reason, that his chances may be enhanced by receiving attention in the news media or by seeking the support of a special interest group, may prompt representatives of the press or the special interest group to elicit information from individual commissioners. Although the commissioner may feel that he has been placed in the untenable position if such a situation develops, it appears that members of the press generally have understood the need to keep certain information confidential once the need for confidentiality has been explained to them. Therefore, the need for maintaining the confidentiality of certain information does not appear to be incompatible with the goal of establishing a selection process which will "deserve and receive public respect and trust" as long as the commission can justify the need for confidentiality and is willing to explain this need to persons seeking information from individual commissioners.

Commission Nomination

Once the nominating commission has screened all available candidates, the commission is required to meet for the purpose of reducing the field to the actual number of candidates to be nominated. After considerable discussion of the qualities and qualifications of the applicants, each commissioner indicates his preferences by casting a ballot. Not only do balloting procedures differ from one commission to another, but more than one balloting technique may be used at different times by a single commission. One of the Missouri commissioners interviewed by Watson and Downing described the balloting techniques of his commission as follows:

> In reducing the list to the three persons to be submitted to the Governor, no standard procedure is followed. Sometimes the commissioners rank the entire list of names according to their preferences,

using a preferential ballot type of procedure. At other times the commissioners each vote for three persons of their choice.[31]

Regardless of the balloting technique utilized, commissions traditionally have voted by a secret ballot. Although the decision to vote by secret ballot generally is made by the commission, sometimes a secret ballot is required by the constitutional or statutory provisions creating the plan.

In Nebraska there is a requirement that the commission vote orally. It should be noted that this requirement was not written into the original plan, but came about as a result of a constitutional amendment adopted in 1972 and implemented by a 1973 legislative enactment after expressions of concern over the methods utilized by certain Nebraska commissions in arriving at their list of nominees.[32]

Evidently, certain commissions in Nebraska had been suspected of engaging in what has been called "panel-stacking". Watson and Downing have described this practice as "any form of panel selection wherein the nominating commission, through the choice of a particular combination of nominees, seeks to preempt the appointing function, or where the commission accedes to the governor's express wishes by nominating the person he desires to appoint."[33] Watson and Downing found certain variations of "panel-stacking" to be present in Missouri.[34] Apparently, the variation which was suspected to be present in Nebraska is that described as "panel-loading"—selection of a combination of nominees so that the governor is forced to appoint someone he does not want, but who is acceptable as the lesser of two or three evils.

It is questionable whether the requirement of an oral vote will produce the desired result of preventing "panel-stacking". In fact, such a procedure may increase the likelihood that individual commissioners will succumb to pressures by other commission members. However, it is too early to assess the consequences of such a development.

Submission of Names to Appointing Official

After a commission has decided which candidates it will nominate for a particular vacancy, it normally is required to list the names of these candidates in alphabetical order and

31. Watson and Downing, *supra* note 11, at 103.

32. For similar reasons, Alaska adopted an "open ballot" procedure in 1967 (see discussion on p. 157).

33. *Id.* at 107.

34. *Id.* at 101.

forward the list to the appointing official. Under most merit plans, the commission is required to submit the names of three nominees for each vacancy. However, in states in which the plan covers trial level courts in sparsely populated areas, the plan often calls for the submission of the names of two nominees.

TABLE IV
Submission of Names to Appointing Official

Jurisdiction	Number of Nominees	Information Supplied To Appointing Official
Alabama (Jefferson County)	3	Names Only: Commission states to governor that no significance should be attached to the order in which the names are listed
Alaska	2 or more	Names Only
Colorado	3/Appellate 2-3/Trial	Names Only*: Governor may also ask to consult with commission members
D. C.	3	Names Only
Florida	3 or more	Names Only
Georgia	3	Names Only
Idaho	2 - 4	Names Only
Indiana	3	Written evaluation of each nominee based on considerations set out in the statutes
Iowa	3/Appellate 2/Trial	Names Only: Alphabetical order
Kansas	3	Names Only
Maryland	5 - 7+	Names Only: Alphabetical order
Missouri	3	Names Only*
Montana	3 - 5	Names Only
Nebraska	2 or more	Names Only*
N. Y. C.	**	Committee may designate certain candidates as "exceptionally well-qualified"
Ohio	3	Names Only
Oklahoma	3	Names Only
Pennsylvania	3++	Names Only
Tennessee	3	Names Only
Utah	3	Names Only
Vermont	3	All information the commission deems appropriate
Wyoming	3	Names Only

*Governor may request additional information
+Commission may submit less than 5 names if an incumbent is seeking reappointment
**A list of approved candidates is maintained by the Mayor's office and is not limited to a precise formula based on specific vacancies
++Fewer than 3 names may be submitted upon majority vote of commission and prior approval of the governor

Most plans attempt to insure that the appointing official and the nominating commission will remain independent from each other throughout the selection process. Some plans actually contain provisions which explicitly state that neither should attempt to influence the other. Still other plans carry this to an extreme and provide that *only the names* of the nominees, *and nothing more*, are to be submitted to the appointing official. However, recognizing that the appointing official might require or desire some guidance in this regard, many plans require or allow the commission to submit all the information accumulated on the nominees to the appointing official along with the list of names. In Colorado, after the commission has submitted its list of nominees, the governor may ask to consult with commission members or request that the information which the commission has compiled on particular nominees be forwarded to him. The Indiana plan goes even further, requiring that the commission submit to the appointing official its written evaluation of each nominee. This evaluation must be based on evaluative criteria which are clearly delineated in the statutes.

Commission Evaluation of Candidates

When a nominating commissioner evaluates an applicant for a judgeship, the candidate's background, professional skills, character and recommendations all naturally come under consideration. In our questionnaire, we attempted to isolate particular components of these four facets of the hypothetical applicant by asking our respondents to use a one to seven ranking system, "one" meaning that the commissioner felt this particular quality or qualification to be essential for every candidate for judicial office, and "seven" signifying that the possession or non-possession of this quality was of absolutely no significance in evaluating the applicant.[35] A series of qualities and qualifications was then listed. After tabulation we were able to determine the relative importance of these

35. See the "Scoring Key" in Appendix 2-A for the entire ranking scale.

qualities in the minds of those who do the actual nominating. We also asked the individual commissioner some direct questions about his own evaluational approach as well as the approach of his commission.

We recognized from the outset the difficulty in articulating the ingredients for a good judge. This difficulty once led the New York *Times* to remark that the recipe for a good judge was a "pinch of all virtues stirred in integrity." As Professor Maurice Rosenberg wrote:

> An inquiry such as this probes so deeply into imponderables that it may be rash to enter upon it even with the greatest diffidence. Obviously, the custodians of every sector of human activity are eager to compile a list of qualities that 'best equip' a man to perform the chosen work with excellence, but everywhere the composition of the list is notoriously elusive. It is particularly obscure when the qualities sought are personal, subjective and human. Yet as hard as the task may be, there is a special urgency for finding the human qualities in a judge that are most promising and the flaws that are most damaging. More than the teacher, the engineer, or the lawyer, the judge acts directly upon the property, liberty, even life, of his fellows.[36]

Professor Rosenberg's article is perhaps the most perceptive inquiry to date into the relative merits of criteria used in the selection of judges. By using much the same methodology as he employed when he questioned judges directly, we have been able to ascertain which qualities and qualifications most impress those who do the nominating.

The Candidate's Background

Our findings with respect to the importance which the commissioners attach to the candidate's age were inconclusive. The data generally confirmed our initial understanding that extreme youth or extreme old age is a handicap with forty to fifty-nine seen as the optimum age. However, many commissioners wrote that an older applicant might be suitable for the appellate bench (particularly if he had been a trial judge) yet be considered too old to begin a term as a trial judge. The general feeling seemed to be summed up by one commissioner's explanation that "age is an individual matter, not controlling." Table V presents the tabulation as to the importance of the candidate's background.

36. Rosenberg, *The Qualities of Justices—Are They Trainable?*, 44 TEXAS L. REV. 1063, 1064 (1966).

TABLE V
Background Factors as Criteria for Evaluating Candidates

Average	Factors	Rankings in Percentages: Most Relevant 1-2	3-4	Least Relevant 5-7
1.171	Mental health	97.2	1.7	1.1
1.750	Physical health	80.8	15.1	4.1
3.557	Previous service as a judge	22.4	52.6	25.0
3.734	Law school record	26.0	41.0	32.1
3.901	Knowledge of the community	17.4	46.1	36.5
3.904	Active in professional activities	13.7	54.5	31.8
4.180	Experience in supervising	10.8	48.5	40.6
4.188	Previous service as prosecutor	11.9	47.0	41.0
4.358	Active in civic, community affairs	11.1	40.2	48.8
4.657	Law school candidate attended	5.0	42.1	53.0
4.889	Undergraduate school	3.9	30.8	65.3
5.381	Past partisan political activity	3.9	24.3	71.8
5.475	Previous service as elected statewide official	2.8	19.5	77.8
5.533	Previous service as elected local official	3.0	17.5	79.5

Considerations of health are paramount. In fact, mental health received the highest ranking of all with 90% of the responses being "1". Various responses also noted special concerns: alcoholism, vision or speech difficulties, vigor, nervous condition, and, as one perceptive respondent noted, "wife's health". Otherwise, however, the candidate's background appears surprisingly unimportant in comparison with his other qualifications. Commission members do not stress the candidate's law school record, and are quite unimpressed with the prestige of his law school or his undergraduate record. We found that more experienced commissioners are prone to disregard the prestige of the candidate's law school, and contrary to what one might suspect, lay members are far more influenced by the candidate's legal education than are the members of the bar.

Perhaps more significant is the commissioners' disregard for previous public service. Although previous service as a judge is naturally seen to be of some importance, service as a prosecutor is regarded coolly, ranking below activity in professional (bar) affairs and general supervisory activities. Activity in civic affairs ranked even lower, and being an elected official at either a state or local level ranked at the very bottom of all the attributes, with a majority of the commissioners indicating that this activity was either insignificant (6), or of absolutely no significance (7) to their decision.

Even if the politics is characterized as "past honorable partisan political activity", the commissioners' answers indicate that they are aware that their mission is to exclude political consideration. However, lawyers and laymen differed strongly in their evaluation of past public service. Laymen were much more impressed with civic activity, supervisory experience, and knowledge of the community as well as previous service as a judge or prosecutor. Nor were lawyers as a group more impressed by extensive professional activities, as might be expected. However, when the lawyer members were further pared down to only those appointed or elected by their bar association, (i.e., excluding those lawyers who were appointed by the executive) such bar activity did attain its hypothesized importance. This suggests that it may be somewhat misleading to lump all lawyers as a single interest group.

As Watson and Downing demonstrated, bar loyalties and rivalries can significantly affect the way lawyer members approach the selection process.[37] Bar politics aside, more orthodox political party affiliation may also affect the evaluation process to some extent. For example, Democratic commissioners (even though having a greater proportion of lawyers in their ranks) also tend to put more stock in past activity in civic affairs and in the candidate's knowledge of the community. This accords with the grassroots tradition of the Democratic party, but it also suggests that although the differences in perceptions between lawyers and laymen generally are quite significant, party politics (or at least ingrained political philosophy) may cut across those differences.

37. Watson and Downing, *supra* note 11.

Professional Skill

The criteria in Table VI are concerned with the applicant's background as a lawyer.

TABLE VI
Professional Skills as Criteria for Evaluating Candidates

Average	Factors	Rankings in Percentages Most Relevant 1-2	3-4	Least Relevant 5-7
1.276	Reputation for propriety and integrity in legal matters	95.0	3.0	1.9
1.366	Reputation for fairness	91.4	7.0	1.7
1.573	Professional reputation	86.6	10.1	3.3
1.906	Always well-prepared, thorough	79.9	17.9	2.3
2.160	Knowledge of legal procedure	70.0	24.3	5.8
2.370	Abreast of legal developments	58.0	36.6	5.9
2.772	Level of skill in communication	44.7	45.5	9.7
2.819	Level of skill in written communication	44.5	45.0	10.6
3.036	Amount of trial experience	33.2	55.5	11.3
3.265	Number of years practiced	28.2	52.3	19.5
3.388	General area of practice	27.3	49.1	23.5
3.472	Knowledge of technical substantive law in a particular field of practice	26.3	49.5	24.2
3.494	Honors, distinctions as lawyer	24.4	53.6	21.9
3.953	Amount of appellate experience	13.1	51.7	35.2
4.918	Degree of success (reflected by number of cases won)	3.1	35.2	61.7
4.997	Degree of success (financially)	3.3	32.5	64.1

What stands out in these results is that subjective considerations such as reputation, knowledge, skill in communication, all clearly outrank the more easily ascertainable and measurable qualifications such as amount of experience, number of honors, type of practice and degree of success. When confronted with this question directly, 70.3% of the respondents replied that they themselves placed greater emphasis on the more subjective attributes and 37.6% felt that their commission emphasized the more objectively ascertainable information. However, 51.5% said that their commission employed the more subjective scrutiny more often as a basis for vetoing a particular candidate than as a positive standard for selection. The penchant for subjectivity was not shared equally by all groups of commissioners. For example, laymen were more likely to rely upon the objective facts about the applicant (40.5%) than were lawyers (18.6%).

More specifically, the older (and more experienced) commissioners showed greater concern over the number of years the applicant had practiced law, while younger members emphasized oral and written skills. Lay members, with a few exceptions noted below, tended to assign more weight to nearly all of the listed indicators of professional skill while lawyers tended to be more skeptical in their regard of an applicant's legal skills. However, lawyers were much more interested in applicant's years of practice, especially his trial and appellate experience, than were laymen. Also, the lawyers were more interested in the applicant's success as a lawyer, both financially and in terms of cases won.

The lawyer members' emphasis upon *experience* as a lawyer, in terms of years, type of practice, and measurable success tends to undermine their claim that they placed more reliance on subjective evaluation than laymen. This may indicate that a lawyer's subjective evaluation presumes an experienced, successful practitioner, while the layman is able to focus more precisely upon the task of choosing the best new judge rather than selecting the most successful lawyer for the judgeship. At any rate, it is perhaps reassuring that reputation for integrity and for fairness top the list while degree of financial success is at the bottom.

Character and Personality

These qualities are, for the most part, not peculiar to lawyers or judges, but, as is indicated in Table VII, they are crucial to the selection of judges.

TABLE VII
Character, Personality and Motivation as Criteria for Evaluating Candidates

Average	Factors	Rankings in Percentages Most Relevant 1-2	3-4	Least Relevant 5-7
1.332	Not susceptible to influence	92.1	6.4	1.4
1.412	Possessed of moral courage	92.4	6.1	1.4
1.449	Open-minded, objective	91.7	6.1	2.2
1.691	Emotionally stable	85.9	11.3	2.8
1.989	Desire to serve as judge	74.9	17.6	7.5
2.058	Decisive, not dilatory	74.3	22.7	3.1
2.061	Considerate of others	73.0	23.4	3.7
2.070	Demonstrated self-discipline	71.6	24.3	4.2
2.176	Courteous	68.2	26.4	5.4
2.203	Patient	65.7	29.0	5.3
2.289	Punctual in keeping appointments, schedules	65.0	29.4	5.6
2.292	Industrious, will work long hours	63.1	32.6	4.5
2.358	Understanding, empathetic	60.3	35.2	4.5
2.378	Knowledge of human nature	58.1	36.7	5.3
2.708	Willingness to serve at present judicial salary	55.7	29.2	15.0
2.712	Credit rating	55.6	27.7	16.8
2.804	Humble, not over-bearing	48.0	40.9	12.0
2.972	Professional, neat appearance	34.3	49.7	16.1
2.997	Dedicated to bench as a lifetime job	48.3	31.8	19.8
3.011	Aura of dignity	39.4	45.4	15.2
3.746	Strong-minded	19.7	51.0	29.3
4.235	Sense of humor, witty	11.2	46.6	42.2

As can be seen by the averages, the commissions are quite interested in the character and personality of their future judges. In this respect our findings differ little from Professor Rosenberg's survey of the judges themselves. Although Professor Rosenberg's list of criteria was somewhat different from ours, he discovered a similar focus upon the candidate's non-measurable qualities:

> A striking feature of these highest ranking attributes is that they tend to focus upon the personality or person of the candidate—what he is rather than what he has done, his innate or intrinsic qualities rather than his 'external' attainments.[35]

This concern for each candidate's character and personality is wholly understandable, and it is not surprising that laymen should be particularly sensitive to these human qualities. The difficulty is that this concern is not easily articulated or structured. We will attempt to deal more fully in our recommendations with the task of structuring the evaluation.

Generally, lawyers showed less concern for the applicant's appearance, strong-mindedness, wittiness, decisiveness, punctuality, self-discipline, knowledge of human nature, and credit rating than the laymen. However, the lawyers, perhaps with a concern drawn from their own experiences, were more sensitive to the notion that the applicant not be "susceptible to influence".

Younger commissioners give noticeably less weight to punctuality, wittiness and personal appearance or to an applicant's professional dedication to the bench as a lifetime job. Conversely, older members and Republican members tended to put more stock in neat appearances, punctuality, wittiness and strongmindedness. A final quirk is that those commissioners who have served on the commission longest seemed to have noticeably higher regard for courtesy as a character trait. (Does this say something about their job?)

We also asked the commissioners whether there was any quality which would immediately disqualify a prospect in their own opinion. Almost 90% answered "yes", and the range of "vices" was extraordinary. Most commissioners wrote that dishonesty or lack of integrity was "enough", with a surprising number of respondents concerned about alcoholism. In other responses, individual biases surfaced: "atheist or agnostic", "divorced", "homosexuality", "member of ACLU", "Archie Bunker type". By contrast, only 50% could think of a single quality which would make a candidate pre-eminent above otherwise equally qualified candidates. Again integrity topped the list, but legal experience and legal ability were also in the

35. Rosenberg, *supra* note 36, at 1067

forefront. The sheer number of differing responses is strong testimony to the difficulty of the commissioners' task as well as to the diversity of opinion among them.[39]

Interest Group Recommendations

Finally, we wondered whether a candidate armed with a recommendation from an interest group would impress a commission more favorably. Apparently it depends upon the interest group.

TABLE VIII
Recommendations: Relevance for Evaluating Candidates

		Rankings in Percentages		
		Most Relevant		Least Relevant
Average	Recommendation	1-2	3-4	5-7
3.092	From bar groups	39.5	43.2	17.3
3.143	From other commission members	39.3	40.2	20.5
4.741	From public officials	9.6	34.2	56.8
5.104	From non-legal professionals and business associations	6.1	25.8	68.1
5.106	From *Martindale-Hubbell*	8.5	29.5	62.2
5.729	From labor unions	2.8	14.4	82.7
5.763	From civil rights groups	2.2	14.1	83.5

While a strong recommendation from a bar group or from other commission members ranked the highest, they still ranked lower overall than most character and personality traits (e.g., approximately equal to "aura of dignity"). Other recommendations were almost disregarded, with a strong recommendation from a public official closely edging out an "a" rating in the *Martindale-Hubbell* legal directory. Interestingly, despite its unfamilarity to many lay members, *Martindale-Hubbell* was relied upon almost as much as recommendations from non-legal associations. Laymen were more responsive to recommendations

39. We have edited a list of these responses and included them in Appendices 2-B and 2-C.

from such associations as well as from public officials. Since all but one laymen were appointed by the executive it is not too surprising that these laymen were more receptive to recommendations from public officials. Whether they *should* be is another question. However, bar appointees indicated that they did not listen to recommendations from bar groups any more than they did from executive appointees.

Finally, a recommendation from a labor union or a civil rights group was ignored by nearly all of the commissioners (only 26 respondents gave either of them a ranking of 1, 2, or 3). Democratic members were slightly more receptive to these groups. But on the whole, this finding perhaps represented the hardest evidence that important segments of the community are not consulted in selecting judges under existing merit plans. This finding would not be so serious if in fact the commission did solicit recommendations from cause-oriented interest groups in the *recruitment* of possible candidates. Of course, once recruited, each prospective judge should be evaluated equally. But it is difficult to believe that an applicant's concern for social justice (including the rights of minority groups and workers) should be considered irrelevant to a commission's deliberations. At any rate, the mere suggestion that some segments of the community are excluded from the merit selection process demands further inquiry. Even if proven, it would indict the selection of the commission members themselves more than the actual operation of the nominating commission as a mechanism.

Chapter 3

Outside Influences on the Nominating Process

Unfortunately, knowing something about who the nominating commissioners are and how they go about their business does not offer a complete picture of the nominating process. Other forces which initially may appear to be outside the nominating process, and thus beyond the scope of our inquiry, often may be very influential in the ultimate selection of nominees for a particular vacancy. Because of the method of selection of commission members, two of these outside forces or influences are of particular importance—the influence of partisan politics and the influence of the organized bar. This chapter will attempt to analyze and evaluate the apparent influence of partisan politics and bar associations on the nominating process.

Partisan Politics

All jurisdictions which have adopted the non-partisan merit plan for judicial selection have had to struggle with the problem

of how to insure that the plan actually takes partisan politics out of judicial selection. Of course, no judicial selection plan will ever be entirely free from political influences. Even in Missouri, the plan "has not eliminated political forces from the selection of judges."[1] At times a commissioner may be inclined to favor a member of his own party. But an appointing official is likely to do so more often. In addition, the plan can create its own brand of politics which may be a mixture of both "party" and "bar" politics.

While cognizant of these influences, proponents of the merit plan clearly have intended that the plan be free of the more spurious influences of partisan politics. In particular, it has been their hope that the plan would eliminate the "reward system" whereby individuals are "rewarded" for past service or financial contributions to a political party by being slated or recommended for appointment to judicial office by party leaders.[2] Not only would the elimination of such influences aid in securing a more independent judiciary, but proponents of the plan have asserted that it would actually upgrade the caliber of the men sitting on the bench. Former Attorney General Herbert Brownell has stated that a system based on political rewards tends to produce the "gray mice" of the judicial establishment—"ordinary, likeable people of small talent".[3]

Such a reward system could conceivably develop in a merit plan jurisdiction. The non-lawyer members of most nominating commissions are chosen by the governor of the state. Generally, the governor is also the titular head of the party in his state. Therefore, there can be pressure on the governor to "load" the commission with members of his own party. If the commission were to become dominated by the "governor's people", the chances would be greater that a governor's previously hand-picked candidate might become one of the nominees of the commission, and, in effect, be assured of ultimate appointment. Inevitably, the duty of the commission to decide independently upon a slate of nominees would be destroyed and the system would degenerate into one founded on political "reward" rather than merit.

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1. Watson and Downing, THE POLITICS OF THE BENCH AND BAR (New York: John Wiley and Sons, Inc., 1969), 6.

2. See Niles, *The Changing Politics of Judicial Selection: A Merit Plan for New York*, 22 RECORD OF N.Y.C.B.A. 242, 254 (1967).

3. Brownell, *Too Many Judges Are Political Hacks*, SATURDAY EVENING POST, 18 Apr. 1964.

In their study of the plan in Missouri, Watson and Downing ound some instances of what they termed "panel-wiring": the overnor makes his preferences known to one or more members the nominating commission, either directly or through an termediary. The commission then names a panel containing e name of the lawyer preferred by the governor plus two other ominees chosen on a "what difference does it make" basis.[4] ot surprisingly, existing merit plans contain a variety of pro-sions apparently aimed at preventing such situations from veloping. For example, in many merit plan jurisdictions, ere is statutory or constitutional language requiring the vernor, or other appointing officials, to make commission pointments without regard to political affiliation. As indi-ted in Table IX, certain plans have even gone further, seeking insure non-partisan commission composition by, in effect, aking them bi-partisan. In Colorado, for instance, no more an one half plus one of the commissioners can be members the same political party.

TABLE IX
"Bi-Partisan" Commissions

mmission	*Provision*
'orado	
preme Court minating Commission	No more than half plus one of the members (excluding chairman) can be of same political party.
icial District minating Commissions	No more than 4 of the 7 members can be of same political party.
ver County Court icial Commission	No more than 4 members may be of same political party.
ho	
cial Council	No more than 3 of the 6 appointed members can be of same political party.
iana	
n, Lake, and derburgh County erior Court minating Commissions	No more than 2 of the 3 appointed members can be of same political party.

Watson and Downing, *supra* note 1, at 108.

Indiana (continued)	
Marion County Municipal Court Nominating Commission	No more than 1 of the 2 mayor appointed members, the 2 governor appointed members, and the 2 bar elected members can be of same political party.
Missouri	
Kansas City Municipal Judicial Nominating Commission	No more than 1 of the 2 non-lawyer members nor more than 1 of the 2 lawyer members can be of same political party.
Nebraska	
Supreme Court Nominating Commission and District Court Nominating Commissions	No more than 2 of the 4 governor appointed members nor more than 2 of the 4 lawyer elected members can be of same political party.
Utah	
Supreme Court Nominating Commission and District Court Nominating Commissions	Member initially selected by senate shall be of same political party as governor, and member initially selected by house shall be of opposite political party. Thereafter, subsequent members shall be of opposite political party as their predecessors; no more than 1 of 2 members appointed by governor nor more than 1 of 2 members selected by Bar Association can be of same political party.
Vermont	
Judicial Selection Board	At least 1 of the 3 senators and 1 of the 3 representatives must be of political party which is in minority in the senate and in the house.

Also, many plans attempt to diminish the possibility that commissioners will be subjected to undue influence from political figures or constituencies by prohibiting commissioners, during their tenure, from holding office in a political party or in the local, state, or federal government. Other merit plan provisions seek to prevent commissioners from developing a personal power base or using their positions on the commission to launch their own judicial careers. In some states, commissioners are prohibited from serving for two consecutive terms. In other states commissioners may not serve more than a total of two terms. Generally, commissioners are ineligible for judicial office while serving on a commission and for a period of one to three years thereafter.

In their study of the plan in Missouri, Watson and Downing found some instances of what they termed "panel-wiring": the governor makes his preferences known to one or more members of the nominating commission, either directly or through an intermediary. The commission then names a panel containing the name of the lawyer preferred by the governor plus two other nominees chosen on a "what difference does it make" basis.[4] Not surprisingly, existing merit plans contain a variety of provisions apparently aimed at preventing such situations from developing. For example, in many merit plan jurisdictions, there is statutory or constitutional language requiring the governor, or other appointing officials, to make commission appointments without regard to political affiliation. As indicated in Table IX, certain plans have even gone further, seeking to insure non-partisan commission composition by, in effect, making them bi-partisan. In Colorado, for instance, no more than one half plus one of the commissioners can be members of the same political party.

TABLE IX
"Bi-Partisan" Commissions

Commission	*Provision*
Colorado	
Supreme Court Nominating Commission	No more than half plus one of the members (excluding chairman) can be of same political party.
Judicial District Nominating Commissions	No more than 4 of the 7 members can be of same political party.
Denver County Court Judicial Commission	No more than 4 members may be of same political party.
Idaho	
Judicial Council	No more than 3 of the 6 appointed members can be of same political party.
Indiana	
Allen, Lake, and Vanderburgh County Superior Court Nominating Commissions	No more than 2 of the 3 appointed members can be of same political party.

4. Watson and Downing, *supra* note 1, at 108.

Indiana (continued)	
Marion County Municipal Court Nominating Commission	No more than 1 of the 2 mayor appointed members, the 2 governor appointed members, and the 2 bar elected members can be of same political party.
Missouri	
Kansas City Municipal Judicial Nominating Commission	No more than 1 of the 2 non-lawyer members nor more than 1 of the 2 lawyer members can be of same political party.
Nebraska	
Supreme Court Nominating Commission and District Court Nominating Commissions	No more than 2 of the 4 governor appointed members nor more than 2 of the 4 lawyer elected members can be of same political party.
Utah	
Supreme Court Nominating Commission and District Court Nominating Commissions	Member initially selected by senate shall be of same political party as governor, and member initially selected by house shall be of opposite political party. Thereafter, subsequent members shall be of opposite political party as their predecessors; no more than 1 of 2 members appointed by governor nor more than 1 of 2 members selected by Bar Association can be of same political party.
Vermont	
Judicial Selection Board	At least 1 of the 3 senators and 1 of the 3 representatives must be of political party which is in minority in the senate and in the house.

Also, many plans attempt to diminish the possibility that commissioners will be subjected to undue influence from political figures or constituencies by prohibiting commissioners, during their tenure, from holding office in a political party or in the local, state, or federal government. Other merit plan provisions seek to prevent commissioners from developing a personal power base or using their positions on the commission to launch their own judicial careers. In some states, commissioners are prohibited from serving for two consecutive terms. In other states commissioners may not serve more than a total of two terms. Generally, commissioners are ineligible for judicial office while serving on a commission and for a period of one to three years thereafter.

TABLE X
Restrictions on Commission Membership

Prohibited From Holding Public Office	*Prohibited From Holding Political Party Office*	*Limitation as to Number of Terms*	*Ineligible For Judicial Office*
Alabama	Alabama	*Cannot Serve Two Consecutive Terms:*	*During Term on Commission:*
Alaska	Colorado		
Colorado	Indiana	Alabama	Alabama
District of Columbia	Kansas	Colorado	Iowa
Florida	Missouri	Iowa	Maryland
Idaho	Ohio	Missouri	Pennsylvania
Indiana	Oklahoma	Nebraska	Tennessee
Iowa	Pennsylvania	Oklahoma	
Kansas	Tennessee	Tennessee	*During Term and 6 Months Thereafter:*
Maryland	Wyoming	Utah	
Missouri			Kansas
Oklahoma		*Cannot Serve More Than Two Terms:*	Utah
Pennsylvania			
Tennessee		Kansas	*During Term and 1 Year Thereafter:*
Wyoming		Nebraska	
			Montana
			Ohio
			Wyoming
			During Term and 2 Years Thereafter:
			Florida
			Nebraska
			During Term and 3 Years Thereafter:
			Colorado
			Indiana
			During Term and 5 Years Thereafter:
			Oklahoma

Such sanctions, particularly when coupled with statements concerning the non-political role of the commissioners which are contained in handbooks and rules of procedure compiled by some of the commissions, generally have been successful in making commissioners aware of the fact that political considerations have no place in commission business. This is evidenced by the fact that in evaluating applicants for judicial office, commissioners indicated that they attached little importance to an applicant's past partisan political activity (even

when such activity is characterized as "past *honorable* partisan political activity") and to previous service as an elected statewide or local official.[5]

But just because commissioners know that they are expected to conduct their business in a non-partisan manner does not mean that they automatically do so. In an effort to determine the extent of the influence of politics on commission deliberations, we sought information on the frequency with which political influences or considerations were introduced into commission deliberations, either on a personal or commission-wide basis, and the importance of these political considerations.[6]

One Florida commissioner stated that "it [political considerations] does not influence my votes. However, in my judgment political considerations have been of importance with the majority of the commission on which I serve." This type of response was similar to ones received from several jurisdictions. Another Florida commissioner, however, was more cautious: "I *suspect* that some commission members gave primary consideration to political considerations, but never openly." A Colorado *lay* commissioner reflected a more specific bias: "Bar association members not openly, but in an undertone, mention political parties . . . lay members feel bar association members try to assert pressures."

Although most respondents clung to the notion that commission deliberations were devoid of political influences or considerations, a sizable minority indicated that although political influences and considerations were not a dominant force, sometimes they were present in commission deliberations. Only 2% of the respondents stated that political influences or considerations *always* were introduced into their deliberations, while 10% stated that they were introduced *frequently* and 37% indicated that they were introduced *infrequently*. The remaining 51% of the respondents stated that political considerations were *never* introduced.

Of the 49% who stated that political influences or considerations were introduced (however infrequently) into commission deliberations, only 7% (3% of all respondents) believed that when such considerations actually were introduced they were of decisive importance. Twenty-seven percent of the responding commissioners felt that such influences or con-

5. See Table V on p. 62.

6. See questions III (I) and (J) in the questionnaire in Appendix 2-A.

siderations were of some importance but not decisive. Forty-two percent (20% of all respondents) felt that such influences were of little importance and the remaining 24% felt that they were of no importance. Thus 36% of the total number of respondents stated that political influences had been interjected into their deliberations at some time and that these influences or considerations had some effect, albeit minor in many instances, in determining the eventual selection made by the commission.

For a variety of reasons, these responses cannot be viewed as the definitive picture of political influences on commission business. Because of the *sub rosa* nature of such influences, many of the responses reflected a commissioner's hunch rather than an informed judgment. Also, it is unlikely that commissioners who are most influenced by *sub rosa* political influences or considerations would give a totally candid response to these questions. What the responses do provide is a fairly accurate picture of the amount of "above-the-board" commission politicking that takes place. This is supported by the fact that the responses of the lawyer commissioners generally tended to parallel closely those of the lay commissioners.

The most significant findings relating to political influences actually were drawn from comparisons between certain merit plan jurisdictions. Because the four states with the largest number of commissions and commissioners (Colorado, Florida, Iowa, and Maryland) accounted for over 75% of the total replies to our questionnaire, we focused on the responses from these jurisdictions.

Although the merit plan in each of these four jurisdictions is established on a multi-commission basis, there are some significant differences between the plans. For example, the Colorado and Iowa plans are established by constitution and apply to the filling of all vacancies. Florida's plan, although constitutionally established, applies only to interim vacancies occurring between elections. The plan in Maryland is established by executive order and applies only to interim vacancies.[7] In Colorado, Iowa and Maryland the lay commissioners are appointed by the governor. Lawyer commissioners in Iowa and Maryland are elected by members of the bar at large and in Colorado by a majority vote of the governor, attorney general and chief justice. In Florida, three lawyer commissioners are

7. See Table I, at pp. 27-37.

appointed by the board of governors of the Florida Bar Association, three commissioners (lay or lawyer) are appointed by the governor, and three additional lay commissioners are elected by the six appointed commissioners.[8] The most significant difference between these plans, for the purpose of analyzing the influences of political considerations, is that the Colorado plan provides for "bi-partisan" commissions.[9] No such provision is made in the Florida, Iowa and Maryland plans.

While the restrictive provision in the Colorado plan has, as intended, produced commissions which are bi-partisan in make-up, the lack of such a provision in the other three jurisdictions has produced, for the most part, commissions which clearly are partisan in their composition. For example, all thirty-two of the Iowa lay commissioners who responded to our questionnaire were members of the governor's political party (Republican), as was the case for twenty-one of the twenty-five responding Maryland lay commissioners (Democrat). In Florida, sixty-two of the sixty-eight commissioners who responded to our questionnaire were members of the state's dominant political party (Democrat).

TABLE XI
Political Affiliation of Respondents in Four States

	Colorado	*Florida*	*Iowa*	*Maryland*
Non-Lawyer				
Republicans	33	4	32	2
Democrats	20	18	0	21
Independents	3	0	2	2
Lawyer				
Republicans	16	1	28	10
Democrats	13	44	7	14
Independents	1	1	3	0

8. *Id.*

9. See Table IX, on pp. 72-73.

From this one can conclude that, unless a merit plan contains a restrictive provision similar to Colorado's, a commission will tend to be partisan in its composition. Such commissions could still take on a more bi-partisan character over a period of time if the commissioners' terms were staggered and spread over the terms of governors of opposing political parties. However, this modification must be considered in light of the observations of one Iowa lay commissioner who stated:

> The main flaw I see in appointment of commissioners is that in actual practice all appointees are members of the governor's political party (I believe he receives recommendations from county party committees). This has been true under governors of both major parties. So while we may hold the ideal that politics should have no influence on the selection of judges, the partisan make-up of the commission must realistically have some influence.

Naturally, there are no guarantees that political influences will be of greater significance in the deliberations of a commission which is partisan in make-up than in a commission which is bi-partisan. Bi-partisan commissions may not necessarily produce non-partisan decisions. However, the evidence seems to suggest, at least on the surface, that political influences are less prevalent and are of less consequence to a commission which is bi-partisan in nature. Nearly 70% of the Colorado respondents indicated that political influences or considerations were *never* introduced into commission deliberations. But only 51% of the Florida respondents, 54% of the Iowa respondents, and 39% of the Maryland respondents, made such an assertion.

At the heart of the entire issue, however, is the ultimate impact which the introduction of political influences or considerations has on a commission's ultimate selection. Only 15% of the Colorado respondents felt that such influences crept into their deliberations so as to affect their eventual selections. On the other hand, 39% of the Iowa respondents, 37% of the Florida respondents, and 41% of the Maryland respondents acknowledged the existence of such influences.

What emerges from our survey is that none of the merit plan jurisdictions have been totally successful in eliminating the influence of partisan politics from the judicial selection process. The survey does suggest that a merit plan is more likely to come closer to the ideal if it contains a provision guaranteeing the bi-partisan make-up of a nominating commission. However, the

inclusion of such a provision would appear to have at least one undesirable effect. It could effectively eliminate from commission membership anyone who could not be identified with one of the two major political parties. Because it would appear that alternative solutions to this problem should be developed and tested, a systematic analysis of the factors that encourage and discourage the introduction of political influences and considerations into commission deliberations should be undertaken.

Bar Influence on Lawyer Commissioners

The influence of bar associations on judicial nominating commissions presents a second major area that would benefit from a systematic analysis. This area remains essentially untapped as a source of research and offers great promise for future empirical studies. In this portion of the chapter we wish simply to provide a framework within which future investigations of bar association influence might be conducted. The following "case studies" of four jurisdictions suggest an initial blueprint for such investigations and serve to underscore the potentially large impact that bar associations have on nominating commissions.

Bar Appointment of Lawyer Members: The Birmingham Experience. Since 1950 the Jefferson County Judicial Commission has served as the nominating commission for state circuit judges of Jefferson County (Birmingham, Alabama). The Birmingham Bar Association appoints the two lawyer members of this five-member commission. The early procedures adopted by the bar for making these appointments proved to be unsatisfactory. A third attempt to formalize procedures, in 1954, proved viable and has been retained.

The adoption of the current procedure reflected a reaction against the selection of the association's two commission nominees solely by an association committee. Under the current procedure, the committee only *nominates* two lawyers for the offices to be filled. They then notify the bar membership at large of their two nominees by posting notice at several public buildings and by filing notice with the local newspaper. For ten days after such notice, any ten members of the Bar Association can nominate any other person or persons for the office by signing and filing with the President of the Bar Association a written statement to that effect.

At the end of the ten-day period the President of the Bar Association must mail to the entire membership notice of the

election, including a ballot to be marked and returned to the Executive Committee of the Bar Association within fourteen days. To induce more members to participate in the election, a stamped return envelope is included. The nominee who receives a majority of the votes wins. It became apparent immediately that if there were additional nominees, subsequent ballots might have to be held. The rules specified that these subsequent ballots would be conducted through the mail until one candidate received the requisite majority. In fact subsequent ballots have not been conducted, because there has *never* been an instance where members of the Bar Association have proposed additional candidates.

The Bar committee has turned primarily to individuals who have had positions of leadership in the association. For example, both lawyer members who served on the commission during 1973 were former presidents of the Association. Although this would seem to indicate that only one segment of the bar is represented, the procedure which allows for additional nominations has never been employed.

Several factors may explain the bar's reluctance to nominate additional candidates. Either the bar membership may generally be satisfied with the bar committee's nominations, or the membership may really wish to challenge such nominations but opt to acquiesce for reasons extrinsic to the appointment process (e.g., friendship with bar committee members, fear of bar association ostracism, etc.). These and other factors may explain why bar committee nominations have not been challenged and, indeed, why they probably will not be challenged.

The internal politics of the Birmingham Bar Association has an important political influence on the functioning of the commission itself. Since the leadership of the bar revolves around older, more established attorneys, the names placed on the ballot have reflected the viewpoint that older, more established attorneys are best equipped to evaluate someone for the bench. Several of the younger members of the bar have been highly critical of this process, stating that they felt it did not reflect their views and did not allow them an opportunity to serve. Yet, as noted, any ten members of the bar association can submit a name to be included on the ballot. The fact that this had never been done only reinforces the belief that the young lawyers who state they are not represented on the commission in reality do not feel as indignant about this situation as their language suggests.

The commission rules include the charge that its members act as trustees of the public. Evidently, laymen have not had any difficulty in reconciling themselves to this concept. On the other hand, several of the lawyers have expressed difficulties with this point. Because the lawyer members are nominated by a bar committee and elected by the bar members, they are confronted with a basic conflict—namely, do they vote as individuals or as members of the bar? One lawyer commissioner, who had given quite a bit of thought to the matter, stated that at one time he felt it was his duty to vote for a man who was acceptable to the bar, regardless of his own personal feelings toward the candidate. In retrospect he had concluded that this judgment was wrong. He discovered that by binding himself to vote the wishes of a sample of bar members, he was, in effect, banning himself from taking full advantage of information later presented to the commission during its deliberations—information that would not be known to the bar membership. Such a posture, he concluded, could lead only to subverting the entire purpose of the commission.

Bar Politics Among Lawyers Who Select Lawyer Members: The Missouri Experience. While the Birmingham Bar Association is responsible for the appointment of lawyer members to the nominating commission, the responsibility for selecting the lawyer members of the Missouri commissions rests directly on the state's lawyers. The distinction is narrow but crucial. The lawyer residents of each of Missouri's three court of appeals districts elect one lawyer member to the seven-member Appellate Judicial Commission, and the lawyer residents of the appropriate judicial circuits elect the two lawyer members of the five-member Judicial Circuit Commissions. Theoretically, Missouri lawyers are asked to make an independent determination rather than simply to confirm the bar nominees as in Birmingham. But, as noted by Professors Watson and Downing,[10] the theoretical process bears little resemblance to reality. In practice, rival bar groups campaign extensively for their candidates for the circuit and appellate nominating commissions.

During the depression years of the 1930's schisms developed in the Kansas City and St. Louis bar associations. Lines were drawn roughly between "plaintiff" and "defendant" lawyers. Originally, "plaintiff" lawyers were those practitioners who represented injured persons in personal injury cases. Today

10. Watson and Downing, *supra* note 1.

these lawyers are associated with individual clients. "Defendant" lawyers initially were aligned with those clients (mainly insurance companies and business firms) being sued by injured persons. Today these lawyers are viewed as representing corporate and established economic interests. While the specific alignments are not of great significance for the purpose of this study, the end result of such maneuvering was the division of the bar in both cities into two separate organizations. With the adoption of merit selection in the early 1940's, the respective bar groups backed separate candidates for membership on the commissions.

Lawyer candidates for both the circuit and appellate commissions must be nominated by petition. The legal rules require only twenty signatures on the petition. Thus several candidates could seek these positions. But since the early 1950's there have been only two candidates in each election, one representing each of the rival bar groups. Organizational loyalty has prevailed, preventing nominations that would split the votes of the respective memberships.

The real concern in these bar contests are the judges that ultimately are selected to the circuit benches in Kansas City and St. Louis and the appellate courts of the state. By placing their own representatives on the commissions, the bar groups seek to influence the commission's choice of judicial candidates. A judge who is subtly or even subliminally sympathetic to a "plaintiff" or "defendant" lawyer's viewpoint may have a decisive effect on the outcome of a case. While the importance of such judicial sympathies is often minimized, it would be unrealistic to think that these lawyer-members do not remain vitally concerned with placing judges on the bench who will interpret rules in a particular way.

Bar Influences on All Commissioners

Bar Veto Power Over Committee Choices: The New York Experience. Since 1961, New York City's mayors voluntarily have adopted a merit selection plan for appointments to the Criminal and Family Courts and for interim appointments to the Civil Court. Under the Lindsay administration (1966-1973), the Bar Association of the City of New York was granted a very powerful role in this process.

Originally, the association was assigned only an advisory role in the selection of judges. Names of candidates for judgeships were forwarded by the mayor's office to the association after

the candidates had been approved by the mayor's committee. In response to association objections that it did not have enough time to investigate the candidates, Mayor Lindsay began submitting names to the association contemporaneously with their submission to the mayor's committee. However, the judiciary committee of the association does not consider candidates until the mayor's committee has first passed upon them.

The bar association had assigned applicants to its Judiciary Committee and to the separate sub-committee (Criminal or Family Court Committee) dealing with the particular court for which the applicant was proposed. Following separate investigation and interviews, a joint meeting of the two committees was held and a decision was made to approve or not approve.

During the second Lindsay administration a conflict arose between the association and the mayor. The mayor had appointed several candidates who had been approved by the mayor's committee but disapproved by the association. The mayor agreed that future appointments would not be made without bar association approval. The mayor's committee and the bar association judiciary committee determined that in the event they disagreed as to a single candidate, they would set up a joint subcommittee in order to determine whether either committee had information that was not available to the other. The mayor's committee approval of a candidate is suspended pending the joint subcommittee procedure. After the joint subcommittee confers, a report is sent back to the two committees who reach whatever result they deem appropriate.

The role of the bar association in the selection process under the Lindsay administration undercut, to some extent, the power of the mayor's committee. Without additional study the full extent of bar association influence remains problematic. Several reasons may be advanced for concluding that the veto power of the bar association is inconsistent with true merit selection. First, the bar association is responsible to no one in the community or in public office for its actions. Without doubt, the decisions of the bar association are made by individuals who are unlikely to pass judgment in a cavalier or arbitrary manner. But the fact remains that their decisions are not formally structured or checked by an independent authority. Second, the membership of the bar committees which recommend candidates are not broadly representative of the community, nor even of the bar association. Bar committee mem-

bership is much more difficult to come by than membership in the bar association and is often the result of internal political maneuvering. Third, the analytic justification for a grant of veto power to the bar association is no stronger than that of any other special interest group concerned with the judicial system. Indeed, it may be argued that the close working relationship between bar association members and the judiciary raised questions of self-interest and propriety that should preclude the granting of veto power to a bar association.

Bar Polls Prior to Commission Choices: The Alaska Experience. Original appointments to the bench are made by Alaska's governor from a list of not less than two names submitted for each vacancy by the judicial council, the state's nominating commission. This procedure has been followed since statehood in 1959 and is generally conceded to be quite effective. To aid the members of the judicial council, the Alaska Bar Association furnishes the results of bar polls to the council prior to its nomination of judicial candidates.

Bar polls serve as a means of ascertaining the opinions of the members of the bar association with regard to the qualifications of those lawyers seeking nomination by the judicial council. Two general formats for these polls have been employed in Alaska. The questionnaire concerning candidates for appointment to the Alaska Supreme Court solicits information respecting ten different characteristics of a candidate. The respondent is asked to provide a yes-no answer to these inquiries about impartiality, legal experience, temperament, etc. The second format employs a more comparative technique. Rather than a separate sheet for each candidate, all candidates for the bench are listed on a single ballot. Bar association members are asked to rate each candidate as *Not Qualified, Qualified,* or *Well Qualified.*

Again, without further research it is difficult to gauge accurately the effect of these polls on commission members. An American Bar Association study[11] notes that the Alaska Bar Association has reported the polls to be "quite effective". But such cryptic comments do little to verify the impact of the polls. The bar association readily admits that its polls are intended to influence commission members' opinions of candidates. Yet bar poll opposition (or endorsement) may cut

11. Committee and Section Reports to the House of Delegates, American Bar Association, 1968.

either way. "I would nominate a candidate over the opposition of the bar if I sincerely believed him well-qualified", claims an Iowa commissioner.[12] But a Kansas commissioner admits, ". . . If such opposition (of the organized bar) were known I would not personally concur in his nomination even if I believe him to be qualified, if other substantially equally well qualified persons were available."[13] The double edge of the bar poll sword is equally apparent in Alaska. "Some lay members have been highly suspicious; some lay members have accused the bar association of running a 'popularity contest'; and one lay member is quite convinced he should vote exactly contrary to the ratings indicated by the bar poll."[14]

Concluding Note

It would be naive to think that partisan politics and bar associations do not influence the composition and deliberations of some judicial nominating commissions. By devoting a chapter to these outside influences we have sought to emphasize that the factors that bear on commission choices are not always easy to identify. Obviously, there are factors other than partisan politics and bar associations that influence commission determinations. Nor have the full implications of even these two influences been exhausted in this chapter. However, within the limited scope of this study, we simply wish to emphasize the futility of thinking of nominating commissions as hermetically sealed, self-contained entities. A complete treatment of the substantial outside influences on the commissions remains an unanswered challenge.

12. Niles, *supra* note 2, at fn. 88.

13. *Id.*, at fn. 89.

14. Letter from R. E. Hicks, Executive Director of the Alaska Judicial Council to Allan Ashman, Director of Research of the American Judicature Society, March 7, 1974.

Choosing The Attorney General: An Alternative

Kevin K. Bruce

Nearly 30 years ago, the framers of Alaska's constitution debated the relative merits of electing or appointing the attorney general. The delegates ultimately chose the appointment process, but the public debate over the best method of selecting the state's chief legal officer continues.

Those who favor retaining the appointment process claim that it is the only means by which the chief executive can be assured of a harmonious working relationship between the Department of Law and the Office of the Governor. Those who favor changing to an elective process insist that it is the sole method to insure that the state's chief legal officer acts in a responsible, non-partisan manner. Recent events would seem to suggest that both beliefs are overly optimistic.

Regardless of individual's preference on this question, it is presumed that we can agree that our attorney general should be a lawyer who is guided by the highest standards of professional conduct, who will uphold the law, who will act in the public's interest and who will see that justice is done. Neither election nor appointment can, by itself, guarantee that such an individual will be selected.

Electing the attorney general only ensures that a popular decision has been made, not that a qualified person has been selected. Appointing the attorney general only ensures that the chosen individual is trusted by the governor, regardless of other relevent qualifications or deficiencies. There is, however, a third alternative, which avoids the pitfalls of appointment or political campaigns.

Alaska, along with many other states, has adopted a judicial selection process based on merit which is clearly adaptable for selecting our attorney general. Merit selection of the attorney general will enhance the best aspects of appointment and election without the drawbacks of either.

The system would work like this: whenever the position of attorney general became vacant, any qualified attorney could apply for the position by submitting his or her name to the Judicial Council. As with judges, the Council would screen the applicants by carefully examining their backgrounds, credentials and professional reputations. After a lengthy interviewing process, the Council would forward to the Governor at least four names in nomination. The Governor would then have 30 days to make a selection from these nominees.

Unlike the Governor's other appointments, the attorney general would be required to stand for retention by the voters during each election year in which the Governor runs for election; with a maximum of two four-year terms in office. Under this proposal, an attorney general would be

prohibited from running for public office within four years of having served in that position.

What is gained by adopting such a process? First, we can be confident that our attorney general will be a highly qualified and a respected member of the Bar. Second, we can introduce public accountability into the process without creating an institutional conflict between the attorney general and the chief executive. Third, we are assured of an attorney general who can exercise the responsibility of the office independent of the partisan political desires of the chief executive, but not those of the public. Finally, we eliminate the potential of using the office of the attorney general as a platform for higher office.

This proposal is <u>not</u> a compromise position between an elected or appointed attorney general. It is a distinct third alternative, which should be put before the public. Admittedly, it is a bold and untried plan; to my knowledge no state selects its attorney general through a merit system. But Alaskans have always shown themselves to be innovative, willing to reject past practices that have failed to meet their goals and expectations. It is clearly time for another bold experiment in government.

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

11/7/89
Date

02-519 (REV 8/78)

SJR

15

Original sponsors: Josephson, V.Fischer, Kelly and Sturgulewski

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE JOINT RESOLUTION NO. 15 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska creating a commission on compensation of elected officials.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. Article II, sec. 7, Constitution of the State of Alaska is amended to read:

SECTION 7. SALARY AND EXPENSES. Legislators shall receive annual salaries. They may receive a per diem allowance for expenses while in session and are entitled to travel expenses going to and from sessions. Presiding officers may receive additional compensation. Compensation of legislators shall be set by the Commission on Compensation of Elected Officials.

* Sec. 2. Article III, sec. 15, Constitution of the State of Alaska is amended to read:

SECTION 15. COMPENSATION. The compensation of the governor and the lieutenant governor shall be prescribed by the Commission on Compensation of Elected Officials [LAW] and shall not be diminished during their term of office, unless by order of the commission consistent with a general law applying to all salaried officers of the State.

* Sec. 3. Article XII, Constitution of the State of Alaska is amended by adding new sections to read:

SECTION 14. COMPENSATION COMMISSION. There is established a Commission on Compensation of Elected Officials. The commission is

composed of five members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. Members serve for staggered terms of six years. The governor shall appoint members without regard to political affiliation. A member of the commission may not be employed by the state during the member's term and may not hold an elective state office during the term or within one year thereafter. The legislature may establish other qualifications for members of the commission.

SECTION 15. POWERS AND DUTIES OF THE COMMISSION. Except for retirement benefits, which shall be established by general law applicable to all officers of the state, the commission shall establish the compensation of the governor, lieutenant governor, and members of the legislature, including their salaries, benefits, per diem, and allowances, if any. An order of the commission takes effect at the beginning of the next fiscal year of the state. The commission shall hold a public hearing before issuing an order that changes the compensation of an elected official. At least every two years, but not more frequently than every year, the commission shall review the compensation of elected officials. The commission shall issue an order with respect to salaries not later than thirty days before the end of the fiscal year.

SECTION 16. FINALITY OF ORDER. An order setting the compensation of an elected official is not subject to veto by the governor. An order of the commission is subject to initiative and referendum in the same manner as an act of the legislature. The legislature shall appropriate money to fund the orders of the commission.

* Sec. 4. The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the

election laws of the state.

COMMITTEE REPORT

SENATE

FURTHER: FINANCE

3/21/85

I...e _____

Mr. President

The Committee on JUDICIARY considered SJR 15

proposing an amendment to the Constitution of the State of Alaska creating a commission on the compensation of elected officials.

and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass

[ ] do pass with attached amendment(s)

[ ] replace with/or adopt CS for _____
[ ] new title
[ ] same title and recommends _____

[ ] and attached a "LETTER OF INTENT" [ ] NEW FISCAL NOTE

[ ] reports it back without recommendation

[ ] recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

_____
_____
_____
_____
_____
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_____
_____

MEMBERS HAVING
OTHER RECOMMENDATIONS

_____
_____
_____
_____
_____
_____

Peter Bradley
Chairman

DP
Chairman recommendation